No. 90-727

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

ROBERT G. HOLMES, JR.,

*Petitioner,*

vs.

SECURITIES INVESTOR PROTECTION CORPORATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION

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## QUESTION PRESENTED

The Securities Investor Protection Corporation ("SIPC") sued Robert G. Holmes, Jr. ("Holmes") and others under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sections 1961-68 (1988) ("RICO"), for a complex scheme to manipulate securities that caused the multimillion dollar failure of two securities firms. The District Court granted summary judgment in favor of Holmes and the Ninth Circuit reversed. *SIPC v. Vigman*, 803 F.2d 1513 (9th Cir. 1986). As restated, the one issue presented in this appeal is as follows:

> Was the Ninth Circuit correct when it held that SIPC need not be a "purchaser or seller" of securities to sue under Section 1964(c), which provides that "any person" may sue for "injury to his business or property" "by reason of" "any offense . . . involving fraud in the sale of securities . . . punishable under any law of the United States," wire fraud, or mail fraud in violation of Section 1962?

## LIST OF PARTIES

The petitioner is Robert G. Holmes, Jr. ("Holmes"), the respondent is the Securities Investor Protection Corporation ("SIPC").[1]

SIPC has no parent or subsidiary companies.

---

[1] Eugene W. Bell, Trustee for the Liquidation of Joseph Sebag Incorporated, and Laurence A. Schroeder, Successor Trustee for the Liquidation of First State Securities Corporation (collectively, the "Trustees"), were respondents to Holmes' Petition for a Writ of Certiorari. The Court granted certiorari on the first question presented in Holmes' petition. 111 S. Ct. 1618 (1991). This question concerns SIPC only. The Trustees have standing to assert violations of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, since Joseph Sebag Incorporated and First State Securities Corporation purchased and sold manipulated securities for their proprietary accounts.



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## STATUTES INVOLVED

The text of the principal statutes and regulations involved in this appeal, the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-68), the Securities Investor Protection Act (15 U.S.C. §§ 78aaa-78*lll*), Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5)) promulgated thereunder, and Section 32 of the Securities Exchange Act of 1934 (15 U.S.C. § 78ff), is set forth in the Appendix hereto.

## STATEMENT OF THE CASE

SIPC and its Trustees filed this action on July 22, 1983, for damages sustained as a result of the collapse of Joseph Sebag Incorporated ("Sebag") of Los Angeles, California and First State Securities Corporation ("FSSC") of Miami, Florida.[2] The First Amended Complaint alleges claims against Holmes for violations of RICO, the Securities Exchange Act of 1934 ("1934 Act"), 48 Stat. 891, 15 U.S.C. § 78j(b), and common law fraud.[3]

The First Amended Complaint alleges that Holmes and others engaged in schemes to manipulate the over-the-counter stock market that caused the failures of FSSC and Sebag and the loss of brokerage customers' securities and cash.[4] Laurence A. Schroeder (as successor to John L. Britton) and Eugene W. Bell were appointed as trustees to liquidate FSSC and Sebag, under the Securities Investor Protection Act of 1970, as amended[5] ("SIPA").

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[2] District Court Clerk's Record ("C.R.") 1, p. 1.

[3] C.R. 248, pp. 6-47, 62-78, 141-48.

[4] Holmes and his co-defendants manipulated six different securities issued by Aero Systems, Inc., Aerosonics Corporation, Bunnington Corporation, Creditbank, Inc., Dash Industries, Inc. and Osrow Products Corporation (hereinafter "Target Securities").

[5] Pub. L. No. 91-598, 84 Stat. 1636 (1970) (codified as amended 15 U.S.C. §§ 78aaa-78*lll*).

As a result of acts of Holmes[6] and his co-conspirators, the Trustees suffered damages of approximately $16 million, and SIPC was injured by more than $12.5 million.

In the District Court, Holmes moved for summary judgment asserting a lack of causation between Holmes' conduct and injuries to SIPC and its Trustees. He also contended that SIPC lacked standing because SIPC was not a "purchaser or seller" of securities. On October 31, 1988, the District Court granted Holmes' motions, and SIPC and its Trustees appealed.[7]

The District Court found a genuine dispute existed as to material facts on the RICO issues.[8] The District Court found that: (1) an issue of fact was raised that "Holmes conspired to violate RICO sections 1962(a), 1962(b), or 1962(c);"[9] and (2) an issue of fact was raised whether the predicate acts caused "the injuries" of SIPC and its Trustees.[10] The District Court then found that (1) "The grant of summary judgment on 'causation' applies also to the RICO claims", and; (2) "SIPC does not meet the 'purchaser-seller'

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[6] Holmes is the founder, president, chief executive officer, director and major shareholder of Aero Systems, Inc. ("Aero Systems"), an airplane used parts dealer in Miami, Florida. (C.R. 1293, pp. 4-5.) Aero Systems' stock was manipulated by Holmes (C.R. 1310, pp. 13-15), as was the stock of Bunnington Corporation ("Bunnington"). (C.R. 1310, pp. 37-43.) Bunnington's major shareholders were co-conspirators Vigman and his brother-in-law Isadore Diamond. (C.R. 1317, p. 37.)

[7] C.R. 1344, p. 2. In addition, the District Court entered another order on October 26, 1988, that SIPC "lacks standing" to assert claims against Holmes under Rule 10b-5. Order for Partial Summary Judgment. (C.R. 1341, p. 2.) The Court's basis for summary judgment, in light of *SIPC v. Vigman*, 803 F.2d 1513, 1519 (9th Cir. 1986) (SIPC must be purchaser or seller to sue under Rule 10b-5), was: "6. There is no evidence (SIPC having the burden under *Celotex*) that any pledge of fully paid for customer stock was 'unauthorized.' " (C.R. 1340, p. 6.) By its ruling in 1986, the Ninth Circuit unfortunately limited SIPC's ability to use the securities laws. *See* discussion *infra* n. 252 SIPC's ability to use RICO here must not be similarly so limited.

[8] C.R. 1343, pp. 2-3, ¶¶ 2-4, 6 and 7.

[9] *Id.*, ¶ 5.

[10] *Id.*, ¶ 8.



requirements for standing to assert RICO claims . . . predicated on violations of Section 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act."[11]

The Ninth Circuit reversed. Holmes petitioned this Court for review. This Court granted certiorari solely on the issue of whether SIPC must be a "purchaser or seller" of securities.[12]

## SUMMARY OF ARGUMENT

The text of RICO, including its Liberal Construction Clause and No Supersession Clause, as well as its legislative history, are inconsistent with the imposition of a limitation on standing. RICO's civil remedy section unambiguously confers standing on all entities who are capable of holding a legal or beneficial interest in property. No legal basis exists to engraft *implied* standing principles borrowed from the civil remedial structure of an underlying predicate offense on RICO's own *express* civil remedy. In fact, RICO and the 1934 Act specifically preserve remedies under other laws. No satisfactory justification can be offered why limitations on private civil securities claims should be read into the mail fraud or wire fraud offenses.

Holmes' belated effort to shift attention away from RICO's express standing provision and focus on the "by reason of" causation and the "in his business or property" elements of RICO's civil remedy provision is outside of the grant of certiorari and without merit. In fact, the Ninth Circuit found that SIPC raised a triable issue of fact that Holmes and his co-conspirators caused SIPC's injury, and this Court denied certiorari. SIPC, statutorily and as a matter of common law, is a real party in interest in litigation related to broker-dealer liquidations and is subrogated to the rights of customers. SIPC may, therefore, properly assert the various business and property damage claims. In short, Holmes' effort

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[11] The District Court did not address the mail fraud and wire fraud predicate offenses SIPC and its Trustees alleged and substantiated.

[12] 111 S. Ct. 1618 (1991).

to conflate causation or injury with standing to sue ought to be rejected.

Finally, even though Holmes' policy considerations cannot override text and legislative history, and are properly directed to Congress, empirical data show fears of a RICO litigation explosion are without support. Similarly, no evidence supports Holmes' assertion that RICO is particularly susceptible to abuse or that it is being misused. In fact, RICO's private treble damage enforcement mechanism is essential to maintain integrity in the market place.

In sum, the judgment of the Ninth Circuit should be affirmed.

## ARGUMENT

### I. Because SIPC Serves The Public Interest, It Must Be Allowed To Use RICO To Assist In The Regulation Of The Securities Market.

In 1970, Congress created SIPC under SIPA in response to the collapse of numerous brokerage houses to provide protection for customers of registered brokers, dealers, and members of national securities exchanges.[13] Congress analogized SIPC's role to that of the federal corporations that insure savings and demand deposits.[14] The new program was sponsored by the securities industry and the Securities and Exchange Commission ("Commission").[15] The purposes of the program were:

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[13] 15 U.S.C. § 78ccc; S. Rep. No. 1218, 91st Cong., 2d Sess. 3 (1970); H.R. Rep. No. 1613, 91st Cong., 2d Sess. 4 (1970). Membership in SIPC is automatic upon registration as a broker or dealer with the Securities and Exchange Commission under Section 15(b) of the 1934 Act. 15 U.S.C. § 78ccc(a)(2)(A).

[14] S. Rep. No. 1218, 91st Cong., 2d Sess. 4 (1970).

[15] H.R. Rep. No. 1613, 91st Cong., 2d Sess. 28 (1970); *Hearing on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 12 (1970); *Hearings*

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> to protect individual investors from financial hardship; to insulate the economy from the disruption which can follow the failure of major financial institutions; and to achieve a general upgrading of financial responsibility requirements of brokers and dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss.[16]

SIPA accomplished these purposes in two ways.[17] First, it enhanced the Commission's powers to establish financial responsibility rules for brokers and dealers[18] and to impose on the self-regulatory organizations[19] requirements for the financial examination of their members.[20] Second, it established SIPC.

Congress required SIPC to establish a fund through assessments upon its members,[21] and it authorized SIPC to borrow against the United States Treasury up to $1 billion.[22]

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*on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458: Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 330 (1970).

[16] S. Rep. No. 1218, 91st Cong., 2d Sess. 4 (1970); *see also* H.R. Rep. No. 1613, 91st Cong., 2d Sess. 1 (1970).

[17] *See generally SIPC v. Barbour*, 421 U.S. 412, 415-16 (1975). *See also In re Application of Executive Secs. Corp.*, 702 F.2d 406, 410 (2d Cir.) ("SIPC and its trustees vindicate important public interests"), *cert. denied*, 464 U.S. 818 (1983); SIPC, *1990 Annual Report* 7 (1991) (320,000 customer claims were satisfied in the liquidation of 220 firms over 20 years at a cost of $224,404,844); L. Sloane, *The Safety Net For Securities Holders*, N.Y. Times, Jan. 5, 1991, at 14, col. 14.

[18] 15 U.S.C. §§ 78ccc(e)(3), 78ggg(a).

[19] "Self-regulatory organizations" consist of national securities exchanges and the National Association of Securities Dealers, Inc. ("NASD").

[20] 15 U.S.C. § 78iii(f). Similarly, SIPC is required to work with the self-regulatory organizations to standardize examining procedures and to develop procedures for the early detection of financial difficulty of SIPC members. 15 U.S.C. § 78iii(e).

[21] 15 U.S.C. § 78ddd.

[22] 15 U.S.C. § 78ddd(f)-(h).

SIPA provides that customers' claims will be first satisfied from the assets held by the failed broker-dealer constituting a "fund of customer property,"[23] in which all customers share ratably to the exclusion of general creditors.[24] SIPC funds, therefore, only supplement the fund of customer property.[25]

Each innocent customer with a claim is assured of protection by SIPC.[26] Thus, a significant part of the business of

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[23] 15 U.S.C. §§ 78*lll*(4), 78fff-2(c)(1). Procedurally, a SIPA trustee marshals the assets of the failed broker-dealer and creates a "fund of customer property." The fund consists of cash and securities held by the failed broker-dealer for customers. 15 U.S.C. § 78*lll*(4). The fund does not include securities registered in the customer's name. 15 U.S.C. § 78*lll*(3)-(4). Thus, in a SIPA liquidation a customer has any securities registered in his own name returned to him; a customer's "street-name" securities and cash in the customer's account are pooled in the "fund of customer property."

[24] 15 U.S.C. § 78fff-2(c)(1). Before SIPA, customers only received their *pro rata* share of the fund (then called "single and separate fund," now called the "fund of customer property"). As for unpaid balances, customers shared with general creditors in the general estate. *See* 3 *Collier on Bankruptcy* §§ 60.73-60.76 (14th ed. 1977). Because the fund was usually inadequate, customers suffered losses. Congress moved to remedy these losses by setting up SIPC and its fund to make customers whole, within the limits of SIPA.

[25] SIPC may advance up to $500,000 for each customer for the amount by which such customer's "net equity" exceeds his *pro rata* share of the fund of customer property, but in no event more than $100,000 for that portion of a claim that is for cash. 15 U.S.C. § 78fff-3(a)(1). "Net equity" is the filing date value of securities and cash the failed broker-dealer owes the customer less any amount the customer owes the broker-dealer. 15 U.S.C. § 78*lll*(11). For example, if the fund of customer property totaled $100,000 and the total value of the net equities of all of the customers was $1 million, the customers would share the $100,000 on a *pro rata* basis and SIPC would supplement the fund for each customer (over what the customer received from the fund) to the statutory limits.

[26] Customers of the two failed brokerages generally break down into two groups – those who purchased manipulated Target Securities and those who did not. Their ability to recover losses against manipulators are widely disparate under federal law.

Customers who purchased Target Securities share in the fund of customer property, receive reimbursement from SIPC to the extent that the fund

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SIPC is to advance funds to satisfy the claims of investors whose broker-dealer was injured by fraudulent acts. SIPC is then subrogated to the claims of such customers, including claims against third parties.[27]

In July 1983, the net capital of FSSC and Sebag fell below the statutory limits, and SIPC applied to the courts for the appointment of trustees to liquidate the firms under SIPA.[28] SIPC then advanced more than $12.5 million to satisfy customer claims and to pay expenses of liquidation.[29] In

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of customer property cannot satisfy the customers' net equity claim, and have an action based on Rule 10b-5 or RICO against the manipulators for the difference in price between the Target Securities as manipulated and the price of the Target Securities, post collapse. A class action consisting only of purchasers and sellers of Target Securities has been certified and is consolidated with this case for the purpose of discovery. C.R. 475 (*Cain v. Vigman*, No. 83-5674 AWT (Tx)).

Customers who did not purchase the Target Securities also share in the fund of customer property and receive a reimbursement from SIPC to the extent that their net equity claims are not satisfied by the fund. These customers cannot pursue a Rule 10b-5 action against the manipulators because they neither bought nor sold the Target Securities. With SIPC, this class of customers is, however, virtually made whole, and SIPC succeeds to their rights. Nevertheless, if the Ninth Circuit's decision were reversed, an anomaly would be produced. This class of customers, to whose rights SIPC has now partially succeeded, were victimized by conduct that could be made the subject of a federal RICO criminal prosecution, in which they would be the complaining witnesses. But because they are not purchasers or sellers, neither they nor SIPC would have a civil claim for relief for losses under RICO.

[27] 15 U.S.C. § 78fff-3(a). *See* discussion *infra* n.182.

[28] A net capital deficiency is determined in accordance with SEC Rule 15c3-1. 17 C.F.R. § 240.15c3-1 (1990). Under the Rule, a broker-dealer's liabilities, or "aggregate indebtedness," may not exceed its net capital by more than 1500%. "Net capital" is calculated as net worth less downward provisions for non-liquid assets, missing securities, inventory "haircuts" and other risk associated factors. C.R. 1310, p. 20 ¶ 31 n.7. For example, here FSSC had a net capital deficiency of $2,634,976. C.R. 1310, p. 36, ¶ 86. The deficiencies were caused in substantial part by the acts of Holmes and his co-conspirators. C.R. 1310, p. 34, ¶ 80. *See* discussion *infra* n.226.

[29] C.R. 1317, p. 109.

addition, the Trustees, as successors to the brokerage firms, lost in excess of $16 million.

## II. SIPC Need Not Be A Purchaser Or Seller Of Securities To Maintain An Action Under 18 U.S.C. Section 1964(c).

Holmes and his co-conspirators used FSSC and Sebag as tools of their scheme to defraud. Their conspiratorial conduct violated the federal securities laws and the federal mail fraud and wire fraud statutes. Their conduct also fell within the provisions of RICO.

### A. RICO Provides A Critical Remedial Framework For Victims Of The Sort Of Massive Stock Manipulation That Holmes And His Co-Conspirators Perpetrated.

#### 1. The Background Of RICO.

In 1970, Congress enacted SIPA and the Organized Crime Control Act, Title IX of which is known as RICO.[30]

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[30] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1988 & Supp. I 1989)). Commentary on RICO is extensive. *See generally* Blakey & Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals For Reform*, 43 Vand. L. Rev. 851 (1990) (hereinafter "*Myths*"); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) (hereinafter "*Civil Fraud Action*"); Blakey & Cessar, *Equitable Relief Under Civil RICO*, 62 Notre Dame L. Rev. 526 (1987) (hereinafter "*Equitable Relief*"); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980) (hereinafter "*Basic Concepts*"); Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-4), 87 Colum. L. Rev. 661, 920 (1987); Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 Colum. L. Rev. 774 (1988) (hereinafter "*Goldsmith on RICO*"); Lynch, *A Reply to Michael Goldsmith*, 88 Colum. L. Rev. 802 (1988). Three recent symposia are: *Symposium: The 20th Anniversary of the Racketeer Influenced and Corrupt Organizations Act (1970-1990)*, 64 St. John's L. Rev. 701 (1990); *Symposium: Reforming RICO: If, Why, and How?*, 43 Vand. L. Rev. 621 (1990); and *Symposium: Law and The Continuing Enterprise: Perspectives on RICO*, 65 Notre Dame L. Rev. 872 (1990).



Title IX addresses "enterprise criminality"[31] involving fraud.[32] Congress was concerned with "fraud."[33] In particular, Congress wanted to protect "innocent investors."[34] Because Congress found that "the sanctions and remedies available" were "unnecessarily limited in scope and impact,"[35] Congress enacted RICO to provide criminal and civil sanctions, including imprisonment, forfeiture, injunctions, and treble damage relief for "person[s] injured" in their "business or property" "by reason of" a violation of the statute.[36]

The "legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[37] "[T]he major purpose of [RICO was] to address the infiltration of legitimate business by organized crime," but the statute was designed to reach both "illegitimate" and "legitimate" enterprises.[38] Nevertheless, as this Court observed in *H.J. Inc. v. Northwestern Bell Telephone Co.*: "[the notion that RICO is limited to organized crime] finds no support in the Act's text, and is at odds with the tenor of its legislative history. . . ."[39] "Congress drafted RICO broadly enough to encompass a wide range of criminal

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[31] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (" 'enterprise criminality' " consists of "all types of organized criminal behavior '[ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors.' ") (quoting *Basic Concepts* at 1013-14), *cert. denied*, 465 U.S. 1005 (1984).

[32] *Civil Fraud Action* at 300-06 (analysis of RICO's various predicate offenses).

[33] 84 Stat. 922 (1970).

[34] 84 Stat. 923 (1970).

[35] *Id.*

[36] 18 U.S.C. §§ 1963, 1964(c).

[37] *Russello v. United States*, 464 U.S. 16, 27 (1983).

[38] *United States v. Turkette*, 452 U.S. 576, 590-91 (1981).

[39] 492 U.S. 229, 244-48 (1988). "[C]ourts and . . . commentators have persuasively and exhaustively explained why . . . [RICO] . . . [is not limited] to organized crime. . . . " *Owl Const. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 469 U.S. 831 (1984).

activity. . . . "[40] "[Legitimate businesses] enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[41] Accordingly, RICO fits into a pattern of legislation enacted as general reform, aimed at a specific target, but not limited to the specific target.[42]

Congress directed that RICO "be liberally construed to effectuate its remedial purposes."[43] If RICO's language is

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[40] *H.J. Inc.*, 492 U.S. at 248-49.

[41] *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985).

[42] *See, e.g., United States v. Culbert*, 435 U.S. 371, 373-74 (1978); *Perrin v. United States*, 444 U.S. 37, 46 (1979); *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); *Bell v. United States*, 462 U.S. 356, 358-62 (1983); *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917). *See generally Equitable Relief* at 529 n.13 (other cases collected); *id.* at 568 n.189 (similar drafting of Klu Klux Klan Act of 1871 and Sherman Antitrust Act of 1890); Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, in President's Commission on Organized Crime: Report To The President And The Attorney General – *The Impact: Organized Crime Today* 511-80 (April 1986).

[43] 84 Stat. 947 (1970). *See Equitable Relief* at 532 n.21 (origin of clause traced to work of Edward Livingston between 1820 and 1825). Judicial hostility to change through legislation was common in the 19th century. J. Hurst, *The Growth Of American Law* 186 (1950). It became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed. D. Wigdor, *Roscoe Pound: Philosopher of Law* 174 (1974). In fact, a majority of states have abolished the common law rule of strict construction. *Civil Fraud Action* at 245 n.25. *See also id.* at 288 n.150 (analysis of relation between rules of construction, including rule of lenity, and Liberal Construction Clause). Strict construction is not required by the Constitution. *Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985). Circuit courts faithfully follow its mandate in criminal litigation. *United States v. Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); *United States v. Mazzei*, 700 F.2d 85, 89-90 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); *United States v. Frumento*, 563 F.2d 1083, 1090-91 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *In re Billman*, 915 F.2d 916, 921 (4th Cir.), *cert. denied*, 111 S. Ct. 2258 (1991); *United States v. Elliott*, 571 F.2d 880, 897-98 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Sutton*, 642 F.2d 1001, 1003 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *United States v. Grzywacz*, 603 F.2d 682, 685-86 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *United States v. Godoy*, 678

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plain, it controls;[44] if its language, syntax, or context is ambiguous, the construction that would "effectuate its remedial purposes" "by providing enhanced sanctions and new remedies" is to be adopted.[45] Its language is to be read in the same fashion, whatever the character of the suit.[46]

"Congress was well aware that it was entering a new domain."[47] An issue was whether RICO should preempt other remedies. Congress, however, saved "provision[s] of federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO.[48]

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F.2d 84, 86-87 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 *and* 1183 (1983); and *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988).

It is ironic, therefore, when litigants, as here, expect this Court to ignore the Liberal Construction Clause in civil litigation. *See Sedima*, 473 U.S. at 491 n.10.

[44] *Turkette*, 452 U.S. at 587 n.10; *Russello* 464 U.S. at 29; *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220, 239, *reh'g denied*, 483 U.S. 1056 (1987); *United States v. Monsanto*, 491 U.S. 600, 606 (1989); *H.J. Inc.*, 492 U.S. at 249.

[45] 84 Stat. 923, 947 (1970); *Turkette*, 452 U.S. at 587-88, 593; *Russello*, 464 U.S. at 27; *Sedima*, 473 U.S. at 497-98; *Monsanto*, 491 U.S. at 609; *Tafflin v. Levitt*, 110 S. Ct. 792, 799 (1990).

[46] *Sedima*, 473 U.S. at 489; *Shearson*, 482 U.S. at 239; *cf. Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (Holmes, J., dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction").

[47] *Turkette*, 452 U.S. at 586.

[48] 84 Stat. 947 (1970). *Cf. FMC Corp. v. Holliday*, 111 S. Ct. 403, 408 (1990). Such clauses are a feature of federal statutes. *See, e.g.*, Securities Exchange Act of 1934, ch. 404, § 28(a), 48 Stat. 881, 903 (codified as amended at 15 U.S.C. § 78bb(a) (1988)) ("rights and remedies" "in addition" to "any and all other rights" that exist). SIPA is considered an amendment to the 1934 Act. 84 Stat. 1634 (1970). Congress frequently enacts overlapping statutes. *See, e.g., United States v. Batchelder*, 442 U.S. 114, 118-21 (1979); *United States v. Bishop*, 412 U.S. 346, 350-61 (1973); *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-47 (1952); *United States v. Gilliland*, 312 U.S. 86, 95-96 (1941). This Court does not prohibit the application of two statutes to the same conduct. *See United States v. Maze*, 414 U.S. 395, 405-09 (1974) (Burger, C.J., dissenting) ("The mail

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"Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the victims."[49] Such overlap between statutes "is neither unusual nor unfortunate."[50] The existence of cumulative remedies furthers remedial purposes.[51]

### 2. Standards Of Unlawful Conduct Under RICO.

Title 18, United States Code, Section 1962, sets forth standards of "unlawful" conduct. Section 1963 sets out criminal penalties, and section 1964 sets out civil remedies. RICO is not primarily criminal and punitive, but primarily civil and remedial.[52]

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fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct . . . [including] securities fraud. . . . "); *United States v. Weatherspoon*, 581 F.2d 595, 599-602 (7th Cir. 1978) (18 U.S.C. §§ 1001, 1341, 1963 may co-exist); *United States v. Brewer*, 528 F.2d 492, 497-98 (4th Cir. 1975) (18 U.S.C. § 1341 and 15 U.S.C. § 375 may co-exist) (citing *Edwards v. United States*, 312 U.S. 473 (1941) (mail fraud and securities fraud)). The securities laws and RICO may, therefore, properly each apply to the same conduct; remedies under each are *expressly* preserved by their texts.

[49] *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). *See* Goldsmith, *Civil RICO Reform*, 71 Minn. L. Rev. 827, 840-48 (1987).

[50] *SEC v. National Sec., Inc.*, 393 U.S. 453, 468 (1969).

[51] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983).

[52] *Turkette*, 452 U.S. at 592-93; *Sedima*, 473 U.S. at 497-98; *Shearson*, 482 U.S. at 238-42; *Tafflin*, 110 S. Ct. at 799 (citing *Sedima*, 473 U.S. at 492 n.10). Statutory classifications control over federal common law classifications. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-15 (1981). When Congress so classifies a statute, the classification is entitled to great deference. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). *See also* 115 Cong. Rec. 6993 (1969) (Stat. of Sen. Hruska) ("[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill."); 116 Cong. Rec. 602 (1970) (Stat. of Sen. Hruska) ("the principal value of this legislation may well be found to exist in its civil provisions").



#### a. Predicate Offenses.

Title 18, United States Code, Section 1961(1) defines RICO's predicate offenses and includes:

> Any act . . . under . . . title 18, . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . [and] any offense involving . . . fraud in the sale of securities . . . punishable under any law of the United States. . . .

##### (i) *Mail And Wire Fraud.*

Title 18, United States Code, Sections 1341 and 1343 prohibit "devis[ing] . . . any scheme . . . to defraud [and] . . . executing such scheme" by mailing a letter or using an interstate wire communication.

##### (ii) *Fraud In Sale Of Securities.*

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), makes it

> unlawful for any person . . . by the use of any means . . . of interstate commerce or of the mails . . . to use . . . in connection with the purchase or sale of any security . . . any manipulative . . . device . . . in contravention of such rules and regulations as the [Securities and Exchange] [C]ommission may prescribe. . . .

The Commission promulgated Rule 10b-5, 17 C.F.R. § 240.10b-5, which provides, in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of . . . interstate commerce, or of the mails . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> * * *
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

(iii) *Securities Criminal Provision.*

Section 32(a) of the 1934 Act, 15 U.S.C. § 78ff(a), provides, in relevant part:

> Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful . . . shall upon conviction . . . be fined . . . or imprisoned . . . , or both. . . .

The 1934 Act was passed to "insure the maintenance of fair and honest markets in [securities] transactions."[53] Section 10(b) is "a 'catchall' clause to enable the Commission 'to deal with new manipulative [or cunning] devices.' "[54] The statute and Rule 10b-5 "prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception."[55] They "preserv[e] the integrity of the securities market,"[56] a goal that serves the market as a whole.[57]

**b. Person.**

Title 18, United States Code, Section 1961(3) provides, in relevant part:

> (3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property. . . .

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[53] 48 Stat. 882 (1934).

[54] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (brackets in original), *reh'g denied*, 425 U.S. 986 (1976).

[55] *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 11 n.7 (1971) (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967) (emphasis in original). *See United States v. Naftalin*, 441 U.S. 768, 773 (1979); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151, *reh'g denied*, 407 U.S. 916 (1972); S. Rep. No. 792, 73d Cong., 2d Sess. 6 (1934).

[56] *Bankers Life*, 404 U.S. at 12.

[57] *Naftalin*, 441 U.S. at 776.



**c. Standards.**

Title 18, United States Code, Sections 1962(c) and (d), provides, in relevant part:

> (c) It shall be unlawful for any person . . . associated with any enterprise engaged in . . . interstate . . . commerce, to . . . participate . . . in the conduct of . . . [its] affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions . . . of this section.[58]

Sections 1962(c) and (d) set the standards against which any person's conduct in a criminal or civil RICO action must be measured to determine if it is "unlawful." They establish, in short, the "wrong."

**3. Section 1964(c): RICO's Private Enforcement Mechanism.**

Title 18, Section 1964(c), RICO's private enforcement mechanism, provides:

> Any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1964(c) expressly sets out the "victim" who can sue ("any person"), "injury" ("injury to business or property"), the "wrong" giving rise to a claim for relief ("a violation of section 1962"), "cause" ("by reason of"), "forum" ("any appropriate United States district court"), and "remedy" (treble damages, attorneys' fees, and costs).

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[58] The First Amended Complaint of SIPC and its Trustees also alleges violations of Sections (a) and (b). J.A. at 54. This brief focuses only on Sections (c) and (d).

Like the antitrust statutes,[59] RICO's civil provisions "create a private enforcement mechanism that . . . deter[s] violators . . . [and] provide[s] ample compensation to the victims."[60] RICO's treble damage provisions "provide strong incentives to civil litigants and are integral to the effort of Congress to enlist the aid of civil claimants in deterring" violations of RICO.[61] Such "private . . . litigation is one of the surest weapons for effective enforcement"[62] of the law; it "provide[s] a significant supplement to the limited resources available to [the government]."[63]

### B. The Ninth Circuit Correctly Relied On The Statute's Plain Meaning And Rejected A Purchaser-Seller Limitation On RICO.

The Ninth Circuit's rejection of a purchaser-seller limitation reflects the statute's plain meaning.[64] The interpretation of RICO begins with its text; structure, legislative history, and congressional policy, as well as language, are

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[59] S. Rep. No. 617, 91st Cong., 1st Sess. 81, 157-61 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-60 (1970). "Even a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987).

[60] *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

[61] *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165 (5th Cir. 1984).

[62] *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (quoting *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)), *reh'g denied*, 382 U.S. 1001 (1966).

[63] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

[64] 908 F.2d at 1467. The Ninth Circuit's well-reasoned opinion is beginning to command general acceptance. *See, e.g., Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 285-86 (3d Cir. 1991).



important.[65] Title 18, Section 1964(c) provides an express claim for relief that sets forth "victim", "injury", "cause",

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[65] Four basic assumptions are integral to any principled effort to interpret a statute: (1) legislative supremacy within the constitutional framework; (2) the use of the statutory vehicle to exercise that supremacy; (3) reliance on accepted means of communication; and (4) reasonable availability of the statutory vehicle to those to be governed by it, not only its text, but any other part of its legislative context that serves to give it meaning. R. Dickerson, *The Interpretation and Application of Statutes* 7-12 (1975).

This Court, in its RICO decisions in *Turkette, Russello, Sedima, Agency Holding Corp., Shearson, Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), *Monsanto, Tafflin*, and *H.J. Inc.* acknowledged several general propositions of statutory construction, established the basic principles that govern the reading of RICO, and consistently applied them to the statute:

> (1) read the language of the statute (*Turkette*, 452 U.S. at 580, 593; *Russello*, 464 U.S. at 20 (citing *Turkette*); *Sedima*, 473 U.S. at 495 n.13; *Shearson*, 482 U.S. at 227; *Monsanto*, 491 U.S. at 606 (citing *Turkette*); *H.J. Inc.*, 492 U.S. at 237 (citing *Russello*));
>
> (2) language includes its structure (*Turkette*, 452 U.S. at 582, 587; *Russello*, 464 U.S. at 22-23; *Sedima*, 473 U.S. at 490 n.8, 496 n.14; *Agency Holding Corp.*, 483 U.S. at 152);
>
> (3) language should be read in its ordinary or plain meaning, but must be viewed in context (*Turkette*, 452 U.S. at 580, 583 n.5, 587; *Russello*, 464 U.S. at 20 (citing *Turkette*), 21-23, 25; *Sedima*, 473 U.S. at 495 n.13; *H.J. Inc.*, 492 U.S. at 238 (citing *Richards v. United States*, 369 U.S. 1, 9 (1962));
>
> (4) language should not be read differently in criminal and civil proceedings (*Sedima*, 473 U.S. at 489, 492; *Shearson*, 482 U.S. at 239-40);
>
> (5) look to the legislative history of the statute (*Turkette*, 452 U.S. at 586, 589; *Sedima*, 473 U.S. at 486, 489; *Shearson*, 482 U.S. at 238-41; *Agency Holding Corp.*, 483 U.S. at 151; *Monsanto*, 491 U.S. at 613; *H.J. Inc.*, 492 U.S. at 236-39 (citing *Sedima*); *Tafflin*, 110 S. Ct. at 796);
>
> (6) look to the policy of the statute (*Turkette*, 452 U.S. at 590; *Russello*, 464 U.S. at 24; *Sedima*, 473 U.S. at 493; *Tafflin*, 110 S. Ct. at 799);
>
> (7) the statute was aimed at the infiltration of legitimate business by organized crime (*Turkette*, 452 U.S. at 591; *Russello*, 464 U.S. at 26, 28 (citing *Turkette*); *Caplin & Drysdale*, 491 U.S. at 630; *H.J. Inc.*, 492 U.S. at 245 (citing *Russello* and *Turkette*));

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"wrong", "forum", and "remedy." "Person", which defines "victim", includes "any entity." 18 U.S.C. § 1961(3). "Any" means "all", not "some, but not others."[66] SIPC is an entity capable of "holding a legal or beneficial interest in property."[67] "Racketeering activity", which is an element of a violation, "means" "section 1341 (relating to mail fraud),

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(8) the statute was not limited to the infiltration of legitimate business by organized crime (*Turkette*, 452 U.S. at 590-91; *Russello*, 464 U.S. at 28; *Sedima*, 473 U.S. at 495, 499; *H.J. Inc.*, 492 U.S. at 242-49 (citing *Sedima*));

(9) the statute is to be broadly read and liberally construed (*Turkette*, 452 U.S. at 587, 593; *Russello*, 464 U.S. at 21; *Sedima*, 473 U.S. at 491 n.10, 497-98; *Monsanto*, 491 U.S. at 609 (citing *Sedima*); *H.J. Inc.*, 492 U.S. at 237; *Tafflin*, 110 S. Ct. at 799 (citing *Sedima*));

(10) where Congress rejects proposed limiting language in a bill, it may be presumed that the limitation was not intended (*Russello*, 464 U.S. at 23-24; *Sedima*, 473 U.S. at 498); and

(11) where Congress includes or omits limiting language in a bill, it is presumed that it did so intentionally (*Turkette*, 452 U.S. at 581; *Russello*, 464 U.S. at 23).

Nevertheless, more than 100 years ago, this Court noted that "[i]t is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. . . . [By] such a construction [it is possible to] annul [the statute] and [render] it superfluous and useless." *Pillow v. Roberts*, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). Dean Roscoe Pound concluded that such "ingenious and astute" constructions (1) "tend[ed] to bring law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." III R. Pound, *Jurisprudence* 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490.

[66] *Mobil Oil Exploration v. United Distribution Co.*, 111 S. Ct. 615, 623 (1991) (since " 'any' encompasses 'all' " . . . the statute is clear and unambiguous [and] that is the end of the matter . . . ") (citing *Sullivan v. Stroop*, 110 S. Ct. 2499, 2502 (1990)); *Affiliated Ute Citizens*, 406 U.S. at 151 ("proscriptions . . . are broad and by repeated use of the word 'any', are obviously meant to be inclusive").

[67] *See* 15 U.S.C. §§ 78ccc(a), (b); S. Rep. No. 1218, 91st Cong., 2d Sess. 5 (1970); H.R. Rep. No. 1613, 91st Cong., 2d Sess. 15 (1970).



section 1343 (relating to wire fraud)" and "any offense involving . . . fraud in the sale of securities." 18 U.S.C. § 1961(4). "Means" is used in the sense of this much, no more and no less; that is, equivalence.[68] The plain text of RICO, therefore, does not impose a "purchaser or seller" limitation on "victim."[69] If any ambiguity is present, the Liberal Construction Clause precludes frustrating the statute's remedial purposes. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in Section 1964, where RICO's remedial purposes are most evident."[70] "[T]he plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation. . . . But the statute requires no more than this."[71] Since the civil claim for relief under RICO is express, additional standing limitations on "victim" are improper.[72] "[T]he Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability."[73]

Nevertheless, the Fourth Circuit in *International Data Bank v. Zepkin*[74] held otherwise. *Zepkin* misreads RICO, ignores its statutory scheme, fails to examine its legislative history, and reflects bad policy.

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[68] *See Sedima*, 473 U.S. at 496 n.14; *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1984).

[69] As in the instance of Section 16(b) of the 1934 Act, "Congress intended to grant enforcement standing of considerable breadth." *Gollust v. Mendell*, 111 S. Ct. 2173, 2179 (1991).

[70] *Sedima*, 473 U.S. at 491 n.10.

[71] *Id.* at 496-97.

[72] *Compare Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748-49 (1975) (implied claim), *reh'g denied*, 423 U.S. 884 (1975), *with Gollust*, 111 S. Ct. at 2181 (express claim) (improper to "read any further condition [on standing] into" Section 16(b)).

[73] *Blue Chip Stamps*, 421 U.S. at 748.

[74] 812 F.2d 149, 151-52 (4th Cir. 1987).

First, *H.J. Inc.*, *Monsanto*, *Sedima*, and *Turkette* hold that RICO's text, structure, and legislative history, not silence in its text or legislative history, control its interpretation.[75] RICO must be liberally construed, and its remedial purposes enhanced, not retarded.[76] The Fourth Circuit in *Zepkin* ignores the Liberal Construction Clause and does not address 18 U.S.C. Section 1964, the statutory provision that *expressly* deals with RICO's civil claim for relief. *Zepkin* also ignores RICO's *explicit* legislative history. Indeed, Congress enacted RICO outside of the antitrust statutes precisely to avoid judicially-created standing limitations on RICO's civil remedies.[77] By reading such limitations back into RICO, the Fourth Circuit "created exactly the problems Congress sought to avoid."[78] Under Article III, a court is " 'not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it.' "[79]

Second, Rule 10b-5 standing limitations are inapplicable to RICO, since the implied claim for relief under Rule 10b-5

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[75] *H.J. Inc.*, 492 U.S. at 236; *Monsanto*, 491 U.S. at 608-09 ("that the legislative history is 'silent' . . . proves nothing"); *Sedima*, 473 U.S. at 495 n.13 ("congressional silence . . . cannot override the words of the statute"); *Turkette*, 452 U.S. at 591 (citing *Naftalin*, 441 U.S. at 774-775; *Culbert*, 435 U.S. at 377). *See also Moskal v. United States*, 111 S. Ct. 461, 467 (1990) (every permissible application need not appear in history); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990) (text not limited by examples in legislative history); *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981); *Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980) (improper to "permit an omission in the legislative history to nullify the plain meaning of a statute"); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark").

[76] *See, e.g., Sedima*, 473 U.S. at 497-98.

[77] *Id.* at 498.

[78] *Id.* at 499.

[79] *Fedorenko v. United States*, 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)) (brackets and ellipses in original).



is designed to enforce the *civil* standards of the securities statutes, and RICO's private enforcement mechanism is designed to enforce the *criminal* standards of the securities statutes, where aggravating factors are present, including the presence of an "enterprise" and a "patterned" violation occurs.[80] Under *United States v. Naftalin*[81] and *SEC v. National Sec., Inc.*,[82] the purchaser-seller limitation is inapplicable in criminal prosecutions or Commission civil enforcement actions.[83] "[T]he terms 'purchase' and 'sale' [in Section 10(b)] are relevant only to the question of statutory coverage."[84] As such, they deal with "wrong," not "victim," "injury," or "cause." When it enacted RICO, Congress understood that this language meant "wrong."[85] As such, it does not serve as a basis to impose a purchaser or seller limitation on "victim," "injury" or "cause" today.

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[80] *See Agency Holding Corp.*, 483 U.S. at 150 ("enterprise" and "pattern" unknown to common law), 153 (RICO is "sui generis").

[81] 441 U.S. at 774 n.6.

[82] 393 U.S. at 467 n.9 (*Birnbaum* doctrine not relevant to suit by Commission; "purchase" and "sale" deals only with "statutory coverage," not "standing" to sue).

[83] *See, e.g., United States v. Newman*, 664 F.2d 12, 17 (2d Cir. 1981) ("It is only because the judiciary . . . created a private cause of action . . . that standing . . . has become a pivotal issue") *cert. denied*, 464 U.S. 863 (1983); *United States v. Charnay*, 537 F.2d 341, 349 n.11 (9th Cir.) ("In a criminal prosecution, the standing problem is, of course, not present and Rule 10b-5 is applicable if the conduct charged falls within the Rule's prohibitions."), *cert. denied*, 429 U.S. 1000 (1976). SIPC, too, should not be so bound. *See* discussion *infra* n.252.

[84] *National Sec.*, 393 U.S. at 467 n.9. The failure of Holmes and the amici to cite or to try to distinguish the holding of *National Securities* and this unequivocal language is telling. "Judicial gloss" becomes part of the statute. *Reves v. Ernst & Young*, 110 S. Ct. 945, 956 (1990) (Stevens, J., concurring) (quoting *Shearson*, 482 U.S. at 268). Stare decisis, strongest in the statutory field, requires adherence to such an interpretation. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990).

[85] *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("always appropriate to assume that our elected representatives . . . know the law").

RICO did not incorporate Section 10(b) and Rule 10b-5; it incorporated Section 32(a) (15 U.S.C. § 78ff(a)), the criminal provisions of the 1934 Act. " '[O]ffense . . . punishable' . . . obviously refers to [the] criminal" provisions.[86] Plaintiffs under RICO, especially public benefit corporations like SIPC, act as " 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate."[87] Had Congress wanted to impose standing limitations on RICO, it had only to add appropriate language.[88] Congress was aware of the overlap between RICO and the securities statutes.[89] Accordingly, forcing civil RICO into a purely *private* law model, as the Fourth Circuit did in *Zepkin*, misconceives the important *public* law functions of RICO's private enforcement mechanism.[90]

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[86] *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 29 (2d Cir. 1983). Merely *negligent* conduct or *strict* liability, for which a civil claim for relief may be possible under the securities acts, does not fall within RICO. *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980) (intent to defraud rather than negligence in violations of § 17 (a) (1) of 1933 Act, § 10(b) of the 1934 Act, but not when engaging in untrue statements or omissions or transactions that operate as a fraud under § 17(a) (2) and § 17(a) (3) of the 1933 Act). *See also Virginia Bankshares, Inc. v. Sandberg*, 59 U.S.L.W. 4887, 4892-93 (1991) (substantive objectives distinguished from self-help enforcement under Section 14(a)); *Gollust*, 111 S. Ct. at 2178-79 (liability distinguished from who may sue under Section 16(b)).

[87] *Agency Holding*, 483 U.S. at 151. *See also Shearson*, 482 U.S. at 241; *Sedima*, 473 U.S. at 493 ("private attorney general provision designed to fill prosecutive gaps").

[88] *Turkette*, 452 U.S. at 581 ("easily narrowed the sweep . . . by inserting a single word"); *Sedima*, 473 U.S. at 489. Under RICO, as under Section 16(b) of the 1934 Act, Congress *expressly* adopted a broad private enforcement mechanism. Restriction beyond the text is, therefore, improper. *Gollust*, 111 S. Ct. at 2179 ("The terms of § 16(b), read in context, thus provide standing of signal breadth, expressly limited only by conditions existing at the time an action is begun.").

[89] *Civil Fraud Action* at 272-73. *See* discussion *infra* n.129.

[90] *See generally* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 5 (1982); *id.* at 8-26; Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).



The District Court here also read the purchaser-seller limitation into the mail and wire fraud offenses.[91] No language in these statutes, however, remotely warrants reading such a limitation into them.[92] The two statutes prohibit "schemes to defraud" that utilize the mails or interstate wire communications.[93] The phrase "scheme to defraud" is not circumscribed by common law-type limitations.[94] The language was drafted in a "sufficiently general" fashion to apply

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[91] The Ninth Circuit did not reach the purchaser-seller issue under the mail and wire fraud offenses, although it was briefed and argued to the Court. The issue is within the grant of this Court's Writ of Certiorari, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 94 n.9 (1982), and this Court may affirm the Ninth Circuit's decision on an independent ground not relied upon below, particularly where it was briefed and argued. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

[92] Nor does *Zepkin* address standing under the mail and wire fraud statutes, as it only involved Rule 10b-5. 812 F.2d at 151 (standing under other claims not decided).

[93] *Compare Pereira v. United States*, 347 U.S. 1, 8-9 (1954), *with Stokes v. United States*, 157 U.S. 187, 188-89 (1895). The two statutes, because they "share the same language," are read together. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

[94] *Durland v. United States*, 161 U.S. 306, 312-14 (1896). Had Congress intended to codify the common law tort of "deceit" or the common law crimes of "larceny by trick or false pretenses," it would have employed common law terminology; it did not; Congress, therefore, intended to adopt a broader concept. *See, e.g., United States v. Turley*, 352 U.S. 407, 411-12 (1957) ("steal" not limited to "larceny"). *Compare* 1 J. Bishop, *Commentaries on the Criminal Law* §§ 565-90 (7th ed. 1882) (setting out technical requirements for property crimes such as embezzlement and false pretenses); 2 W. Lafave & A. Scott, *Criminal Law* 327-409 (2d ed. 1986) (same); Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967 (1953) (same); T. Cooley, *A Treatise on the Law of Torts* 474-75 (1st ed. 1879) (setting out requirements for common law action for deceit). Indeed, decisions and treatises of the time refer to the common law action for misrepresentation not as "fraud" but as "deceit." *See, e.g.*, J. Bishop, *Commentaries on the Non-Contract Law* 132-44 (1889); T. Cooley, *supra*, at 474-75; 1 E. Jaggard, *Hand-Book of the Law of Torts* 558-602 (1895); F. Pollock, *A Treatise on the Law of Torts*, 348-88 (1894). In contrast, the term "fraud," when used alone, signified a much broader range of overreaching conduct. M. Bigelow, *The Law of Fraud*

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to a broad range of schemes.[95] It includes future facts as well as present facts;[96] it also includes promises made with an intent not to perform.[97] It is not limited to misrepresentation; it includes the misappropriation of confidential information, that is, embezzlement.[98] "A comprehensive definition of 'scheme or artifice to defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions."[99] But its focus has always been on " 'wronging one in his property rights by dishonest methods or schemes' and [it] 'usually signif[ies] the deprivation of something of

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3-4, 190-92 (1877); T. Cooley, *supra*, at 473-74, 508-30; 2 F. Hilliard, *The Law of Torts* 74 (1874). *See also* 1 *Bouvier's Law Dictionary* 530 (1897) ("[t]o defraud is to withhold from another that which is justly due him, or to deprive him of a right by deception and artifice"); W. Anderson, *A Dictionary of Law* 474 (1893). *See also Haas v. Henkel*, 216 U.S. 462, 479-80 (1910); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *Dennis v. United States*, 384 U.S. 855, 860-61 (1966).

[95] *See, e.g., United States v. Maze*, 414 U.S. 395, 399 n.4 (1974) (application upheld to credit cards, a device not in existence in 1872).

[96] *Durland*, 161 U.S. at 312-14.

[97] *United States v. Comyns*, 248 U.S. 349, 353 (1919).

[98] *Carpenter*, 484 U.S. at 27. "[I]t is impossible for a person to embezzle the money of another without committing a fraud upon him." *Grin v. Shine*, 187 U.S. 181, 189-90 (1902). In enacting RICO, Congress focused on organized crime stealing stock from brokers, which is then usually used to obtain loans from banks. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969). If purchaser-seller limitations are read into RICO in the securities *and* mail fraud areas, they would permit the defrauder banker to sue, but not the victimized broker. It is improper to *confine* the general language of a statute to facts mentioned in its legislative history. *Harrison*, 446 U.S. at 592. Holmes and the amici would *exclude* from the general language of RICO facts mentioned in its legislative history.

[99] *Fasulo v. United States*, 272 U.S. 620, 628 (1926). *See* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 772 (1980): "During the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute. Indeed, each of the five legislative revisions of the statute has served to enlarge its coverage." The number, of course, is now six. *See* 18 U.S.C. § 1346 (1988) (legislatively setting aside *McNally v. United States*, 483 U.S. 350 (1987)).



value by trick, deceit, chicane or overreaching.' "[100] As this Court observed in *Donaldson v. Read Magazine, Inc.*:[101]

> [The mail fraud statute and others like it] have been regularly enforced by the executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric.

Finally, nothing in the securities statutes "repeal[ed] by implication" the mail or wire fraud statutes.[102] This Court teaches that the "two can exist and be useful, side by side."[103] Accordingly, neither mail nor wire fraud, as each is incorporated into RICO, is limited by a purchaser-seller limitation.[104]

[100] *Carpenter*, 484 U.S. at 27 (quoting *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924))). *See also Fasulo*, 272 U.S. at 627 ("something of value by trick, deceit, chicane or overreaching."). The only substantive area carved out of the concept of "scheme to defraud" by this Court is violence. *Id.* at 628.

[101] 333 U.S. 178, 190 (1948).

[102] *Edwards*, 312 U.S. at 484.

[103] *Id.*

[104] Difficulties arise, however, when parties or courts "confus[e] mail [or wire] fraud with common law fraud." *Armco Indus. Credit Corp. v. SLT Warehouse*, 782 F.2d 475, 481 (5th Cir. 1986). The tendency is to restrict "defraud" to deceit-like elements. Neither misrepresentation, omission, materiality, nor detrimental reliance plays any role in the jurisprudence of mail or wire fraud. *See, e.g., L. W. Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 839 n.53 (5th Cir. 1990) (no materiality or reliance for mail or wire fraud). Accordingly, the suggestion that common law-type restrictions should be read into "scheme to defraud" is inconsistent with this Court's jurisprudence. Following *Durland*, the circuits also developed, as mandated, their "scheme to defraud" jurisprudence outside of the framework of common law deceit. *See, e.g., Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 991 (8th Cir. 1989) (cheating subcontractors meets mail fraud and RICO). It is not necessary to have a misrepresentation to have a scheme to defraud. *See, e.g., Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.) (bribery may serve as basis for mail fraud) ("A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another . . . would be a scheme to defraud though no lies were told."), *cert. denied*, 313 U.S. 574 (1941); *see also Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.) (contract price raised by fictitious extra charges) ("The

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### C. RICO's Plain Meaning Is Supported By Its Legislative History

When "the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances."[105] But if RICO's legislative history is examined, far from finding a "clearly expressed legislative intention to the contrary,"[106] the legislative history demonstrates that special judicial standing limitations should not be read into RICO.

RICO grew out of separate proposals made by different senators. Only after study by both Houses of Congress and the participation of governmental agencies and bar associations were the two approaches merged, the legislation extended to the full range of fraud offenses, and the legislation drafted so that inappropriate standing or proximate cause limitations

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law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."), *cert. denied*, 314 U.S. 687 (1941). All that is required is a scheme to defraud (plus the other RICO elements) and injury to business or property proximately caused by the scheme. Reliance by the victim may be a *sufficient* showing for proximate cause, but it is not a *necessary* showing. *See, e.g., Taffet v. Southern Co.*, 930 F.2d 847, 857 (11th Cir. 1991) (fraud on utility gives rise to RICO claim by rate payers); *Environmental Tectonics v. W. S. Kirpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988) (fraud on government gives rise to RICO claim by losing bidder), *aff'd on other grounds*, 110 S. Ct. 701 (1990). Even the common law did not go that far. *See, e.g., Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936) (testator deceived into disinheriting plaintiff); *Mitchell v. Langley*, 143 Ga. 827, 85 S.E. 1050 (1915) (holder of life insurance policy fraudulently induced to change beneficiaries). *See also Schmuck v. United States*, 489 U.S. 705, 711-12, *reh'g denied*, 490 U.S. 1076 (1989) (mail fraud prosecution upheld where misrepresentation not made to individual who suffered loss). *See generally Equitable Relief* at 571 n.194 (deceit jurisprudence developed in atmosphere of discredited *laissez faire* and *caveat emptor*), 587 n.238 (inapplicability of common law limitations).

[105] *Demarest v. Manspeaker*, 111 S. Ct. 599, 604 (1991).

[106] *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570, 1575 (1990) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). *See also Turkette*, 452 U.S. at 580 (quoting *Consumer Product Safety Comm'n*).



would not circumscribe its private enforcement mechanism.[107]

The process began in 1951 when the Kefauver Committee disclosed organized crime's infiltration into legitimate business.[108] By 1960, the criminal infiltration of labor unions was documented by the McClellan Committee.[109] Then, the McClellan Committee exposed the structure of the Mafia or LaCosa Nostra,[110] which led to the introduction in the 89th Congress of S. 2187 by Senator John L. McClellan.[111]

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[107] This history is traced in *Goldsmith on RICO* at 776-86. Professor Goldsmith found parts of the legislative history that Professor Lynch missed in *RICO: The Crime of Being a Criminal* (Parts 1-4), 87 Colum. L. Rev. 661, 920 (1987). *See also Basic Concepts* at 1014-21 (general legislative history); *Civil Fraud Action* at 249-80 (detailed review of legislative history); Note, *Functions of RICO Enterprise Concept*, 64 Notre Dame L. Rev. 646, 647-54 (1989) (detailed review of legislative history).

[108] *Basic Concepts* at 1014 n.21 (Senate reports cited).

[109] *Basic Concepts* at 1014 (Senate reports cited).

[110] *Id.* at 1015 (Senate reports cited).

[111] S. 2187, 89th Cong., 1st Sess. (1964). Section 1 of the bill included "Findings and Declaration of Fact;" they foreshadow "Statement of the Findings and Purpose" in Pub. L. No. 91-452, 84 Stat. 922. Section 2(a) of the bill prohibited "knowingly . . . becom[ing] . . . a member of (1) the Mafia or (2) any other organization" having as its purpose engaging in designated offenses. Criticism on constitutional grounds by Attorney General Nicholas de Katzenbach of the "membership approach" of S. 2187 led Senator McClellan to take a different approach in drafting RICO. *See Criminal Laws and Procedures: Hearings before the Subcomms. on Crim. Laws and Proc. of the Sen. Judiciary Comm.*, 89th Cong., 2d Sess. 32 (1966) (testimony of Attorney General Katzenbach). *See also id.* at 306-07 (Report of Association of the Bar of the City of New York criticizing S. 2187). "By focusing more on conduct, RICO sought to rectify the constitutional problems raised by S. 2187." *Goldsmith on RICO* at 783 n.70. S. 2187 also indicates that Senator McClellan saw his efforts as aimed at more than the Mafia. *See* Commission on Review of National Policy Toward Gambling, *Gambling in America* 181-82 (1976) (Stat. of Sen. McClellan) ("[I]n none of the hearings or in the processing of legislation in which I have been involved has the term [organized crime] been used in [a] circumscribed fashion [limited to the Mafia].").

The Katzenbach Commission continued the efforts in its studies that culminated in its 1967 Report.[112] Following the Commission's Report, S. 2048 was introduced in 90th Congress by Senator Roman L. Hruska.[113] Senator Hruska called the Senate's attention to the "manipulation . . . of stock"[114] and expressed concern with "bankruptcy fraud."[115] Significantly, S. 2048 included the "full range of criminal and civil sanctions . . . [for] enforcement officials and . . . persons adversely affected."[116]

Senator Hruska's proposal, studied by the American Bar Association,[117] came "to grief in part precisely because it could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent – appropriate in a purely antitrust context – setting strict requirements on questions such as 'standing to sue' and 'proximate cause' ".[118] In the next

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[112] President's Comm. on Law Enforcement and Admin. of Justice, *The Challenge of Crime in a Free Society* 190 (1967). Senator McClellan's bill was carefully studied by Professor Donald R. Cressey. Cressey, *The Function and Structure of Criminal Syndicates* in Task Force Report: *Organized Crime* 25 (1967). Professor Cressey's ideas were influential in the drafting of RICO. *Civil Fraud Action* at 253 n.46; *Goldsmith on RICO* at 781-83.

[113] S. 2048, 90th Cong., 1st Sess. (1967). Companion legislation was introduced in the House by Congressman Richard Poff. H.R. 11,766, H.R. 11,268, 90th Cong., 1st Sess., 113 Cong. Rec. 1796 (1967).

[114] 113 Cong. Rec. 17,998 (1967). He also noted the presence of such influences in "mergers and acquisition" and decried those service industries, including "accounting firms," that had organized crime ties. *Id.*

[115] *Id.* at 17,999.

[116] *Id.* (Stat. of Sen. Hruska). Thus, while Senator McClellan's measure focused on illicit enterprises, Senator Hruska's bill focused on licit enterprises; Senator McClellan, too, emphasized in his bill a criminal approach, while Senator Hruska emphasized in his bill a civil approach, including private enforcement. Neither bill, at this time, included the broad range of federal fraud statutes.

[117] 115 Cong. Rec. 6994-95 (1969) (text of report).

[118] *Sedima*, 473 U.S. at 498.



Congress, Senator Hruska introduced S. 1623 as a free-standing bill.[119]

Meanwhile, the Penal Reform Commission recommended a number of concepts later reflected in RICO.[120] Senator McClellan, too, introduced S. 30, the "Organized Crime Control Act of 1969."[121]

Finally, Senators McClellan and Hruska introduced S. 1861.[122] S. 1861 included criminal and civil sanctions, although, unlike S. 1623, it did not include an express private treble damage remedy.[123] Senator McClellan said that he did not want to see "imported [into the bill] the great complexity

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[119] 115 Cong. Rec. 6992 (1970).

[120] *Civil Fraud Action* at 253 n.47 ("enterprise" and "pattern of racketeering").

[121] 115 Cong. Rec. 827 (1969). In urging action on his legislation, Senator McClellan made a major speech on organized crime in which he focused on "various bankruptcy fraud techniques." 115 Cong. Rec. 5874 (1970).

[122] 115 Cong. Rec. 9567 (1969). S. 1861 contained findings similar to those in S. 30; they are now found Pub. L. No. 90-452. *Id.* at 9568. S. 1861 applied to both licit and illicit enterprises; its predicate offenses included 18 U.S.C. Section 2314 (interstate transportation of property obtained by scheme to defraud); they did not yet include bankruptcy fraud, mail or wire fraud, or securities fraud. S. 1861 introduced the Liberal Construction Clause. 115 Cong. Rec. 9571 (1969). While the findings mentioned "corruption" and "innocent investors," they did not, as yet, note "fraud."

[123] "It is likely, however, that a private cause of action would have been implied. . . . " *Civil Fraud Action* at 262 n.71. *Compare Blue Chip Stamps*, 421 U.S. at 730 ("Such a conclusion [is], of course, entirely consistent with . . . *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)") *with Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) *and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982). The current restrictive approach toward finding implied claims for relief did not become law until *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See Virginia Bankshares*, 59 U.S.L.W. at 4892; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-78 (1979).

of antitrust law enforcement."[124] The President in his "Message on Organized Crime" endorsed the treble damage concept, as did the American Bar Association.[125] As a result of recommendations of the Securities and Exchange Commission staff,[126] the federal fraud statutes were added to the provisions of S. 1861. The bill was then incorporated into Title IX of S. 30, reported out,[127] and passed by the Senate.[128]

In the House hearings, the Association of the Bar of New York City thought the bill extended too far beyond organized crime by its inclusion of securities fraud among its predicate offenses.[129] The American Bar Association, however, called for the private treble damage mechanism.[130] In the Senate, Senator McClellan applauded the Association's recommendations.[131] The House Judiciary Committee rejected the

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[124] 115 Cong. Rec. 9567 (1969). That "complexity," of course, is antitrust-type limitations on standing or proximate cause, which primarily affect private litigation. *See Civil Fraud Action* at 263 n.72.

[125] *Measure Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws and Proc. of the Senate Judiciary Comm.*, 91st Cong., 1st Sess. 444 (reprint of President's Message), 259 (ABA testimony) (1969).

[126] *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* 99 n.130 (1985).

[127] S. Rep. No. 617, 91st Cong., 1st Sess. 21-22 (1969). As amended by the Committee, the findings expressly mentioned "fraud" and "racketeering activity" included mail fraud, wire fraud, transportation fraud, bankruptcy fraud, and securities fraud.

[128] 116 Cong. Rec. 972 (1970).

[129] *Organized Crime Control Act: Hearing on S. 30 Before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong., 2d Sess. 294, 329 (1970). Similar testimony was given by the American Civil Liberties Union and the New York County Lawyers Association. *Id.* at 401, 499.

[130] *Id.* at 543-44 (Testimony of President-elect Edward L. Wright).

[131] In particular, he commented that the suggestion of a treble damage claim for relief was a "constructive contribution." 116 Cong. Rec. 25,190 (1970) (Stat. of Sen. McClellan).



objections of the Association of The Bar of New York City and adopted the recommendations of the American Bar Association.[132]

Over the objections of Committee members – the bill went beyond organized crime,[133] and it included a private treble damage provision[134] – the legislation passed the House,[135] and the Senate took up the bill.[136] Senators applauded the American Bar Association[137] and the treble damage mechanism.[138] The Senate passed the legislation,[139] and the President signed it.[140]

Nothing in this legislative process can be plausibly cited to support reading into RICO's *express* private enforcement mechanism the *implied* limitations of the securities statutes. Congress *deliberately* fashioned an express claim for relief, *mandated* its liberal construction, and sought to draft it *precisely* so that such restrictive standing or proximate cause limitations would *not* circumscribe it.

The "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[141] "[S]tatutes

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[132] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 16 (fraud predicates), 17-18 (private enforcement mechanism) (1970).

[133] 116 Cong. Rec. 35,204 (1970) (Stat. of Rep. Mikva). *See also* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970).

[134] 116 Cong. Rec. at 35,205 (Stat. of Rep. Mikva). Fearing that treble damage suits might be used to injure legitimate businesses, Congressman Abner J. Mikva (now Judge) proposed an amendment establishing penalties for their "malicious use." It failed. 116 Cong. Rec. 35,332 (1970).

[135] *Id.* at 35,363.

[136] *Id.* at 36,280.

[137] *Id.* at 36,293 (Stat. of Sen. McClellan).

[138] *Id.* at 36,296 (Stat. of Sen. Dole). Senator Dole had been a supporter of RICO-type legislation when Congressman Poff originally introduced it in the House in 1967. 113 Cong. Rec. 17,948 (1967).

[139] 116 Cong. Rec. 36,296 (1970).

[140] *Id.* at 37,264.

[141] *Russello*, 464 U.S. at 26 (quoting *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983)).

are construed by the courts with reference to the circumstances existing at the time of the passage."[142] Nevertheless, subsequent legislative developments, since they "confirm"[143] a construction of the statute that does not include a purchaser-seller limitation, are entitled to "significant weight."[144]

Efforts to "reform" RICO after *Sedima* focused on Congress.[145] The securities industry[146] and the accounting profession[147] played leading roles. A major effort was made to insert a purchaser-seller limitation.[148] Such legislation was reported in 1990.[149] Writing special rules for one industry, however, is controversial.[150] The bill failed to pass, and the proposed reform no longer provides special rules for specific industries.[151] The securities industry and the accounting profession ought not now obtain in the judicial forum a limitation on RICO that they were unsuccessful in obtaining in the political forum.

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[142] *United States v. Wise*, 370 U.S. 405, 411 (1962).

[143] *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

[144] *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

[145] *See, e.g., Oversight on Civil RICO Suits: Hearings before the Sen. Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (hereinafter "1985 Hearings").

[146] *Id.* at 633.

[147] *Id.* at 248.

[148] *See generally* 133 Cong. Rec. H8835-42 (daily ed. Oct. 10, 1987) (Stat. of Rep. Conyers).

[149] S. Rep. No. 269, 101st Cong., 2d Sess. 20 (1990) (reporting S. 438).

[150] *See, e.g.*, 134 Cong. Rec. E3720 (daily ed. Oct. 21, 1988) (Stat. of Rep. Conyers) ("I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief.").

[151] *See* H.R. Rep. No. 975, 101st Cong., 2d Sess. 8 (1990) (reporting H.R. 5111) (S. 438 rejected because it "would go too far in certain respects and give the appearance of favoring certain industries such as the commodities, securities and savings and loan industries which are currently the subject of major fraud investigation."). *See also* Wall St. J., May 2, 1991, at 6, col. 1 (noting reporting of H.R. 1717, identical to H.R. 5111).



### D. Holmes' Other Standing Arguments Are Not Within The Grant Of Certiorari And Are Meritless.

Holmes and the amici go beyond this Court's grant of Certiorari. They conflate aspects of different standing doctrines.[152] The "doctrine of standing in the federal courts" is a complex intermixture of prudential rules formulated by the judiciary, statutory law, and constitutional limitations.[153] While Congress may not "abrogate the Art. III minima," it "may, by legislation, expand standing to the full extent permitted by Art. III" without regard to "prudential standing rules."[154] Under Section 1964(c), standing, therefore, may be used in several different ways: "victim" ("any person"), "injury" ("in his business or property"), and "cause" ("by reason of").[155] Nothing Holmes or the amici offer in support of their "by reason of" or their "in the business or property" arguments[156] warrants departure from this Court's practice in this area.[157]

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[152] *Petitioner's Brief* at 9-16 (injury), 16-21 (cause) (hereinafter "Holmes Brief"); *Brief of Arthur Anderson & Co., et al.* at 9-18 (hereinafter "Firms' Brief"); *Brief of American Institute of CPA's* at 16-17 (hereinafter "Institute's Brief").

[153] *See generally Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

[154] *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

[155] The most succinct, perceptive, and discriminating lower court treatment of "standing" under RICO is found in Judge Thornberry's opinion in *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 743-48 (5th Cir. 1989). *See also* Judge Scirica's review of the authorities in *In re Sunrise Sec. Litig.*, 916 F.2d 874, 878-82 (3d Cir. 1990).

[156] *See American Nat'l Bank and Trust Co. v. Haroco*, 473 U.S. 606, 608 (1985) ("Petitioners do not appear to have made this precise argument below, it was not addressed by the Court of Appeals, and it quite clearly is not included in the question presented by their petition for certiorari.")

[157] *Hecklen v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (citing *McGoldrich v. Campagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940)); *J.I. Case*

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### 1. The "By Reason Of" Argument Ought To Be Rejected As Not Within The Grant Of Certiorari.

Holmes and the amici suggest that SIPC cannot meet the requirement of Section 1964(c) that injury to business or property be "by reason of" a violation of Section 1962.[158] This Court, however, granted certiorari "limited to Question 1 presented by the petition".[159] These arguments, therefore, ought to be rejected.

### 2. The "By Reason Of" Argument Ought To Be Rejected, Since A Material Question Of Fact Was Raised As To Proximate Causation.

Holmes moved in the District Court for summary judgment and asserted a lack of a material question of fact on the causal relation between Holmes' conduct and the injuries to FSSC, Sebag, and SIPC.[160] The District Court granted the motion.[161] The Ninth Circuit reversed and found that if "Holmes conspired with [his] codefendents, and if the codefendents caused [as the District Court found for summary judgment purposes] the alleged injuries, then Holmes is legally responsible"[162] for the various injuries.

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*Co. v. Borak*, 377 U.S. 426, 428-29, n.3 (1964); *Irvine v. California*, 347 U.S. 128, 129-30 (1954). In particular, raising standing to sue for the first time on appeal is improper. *McCandless v. Furland*, 293 U.S. 67, 73-74 (1934) (real party in interest) ("The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court.").

[158] *Holmes' Brief* at 16-21; *Firms' Brief* at 9-18; *Institute's Brief* at 16-17.

[159] 111 S. Ct. 1618 (1991).

[160] C.R. 1281.

[161] Pet. App. 41a.

[162] 908 F.2d at 1468-69.



Section 1964(c) provides recovery for injury to business or property "by reason of" a violation of Section 1962. " '[B]y reason of' . . . simply imposes a proximate cause requirement on plaintiffs."[163] In *Haroco*, the Seventh Circuit aptly observed, "This causation requirement might not be subtle, elegant or imaginative, but . . . it is based on a straightforward reading of the statute as Congress intended it to be read."[164] As such, a plaintiff, to recover under RICO, need only prove a violation of section 1962 and an injury proximately resulting from some or all of the activity comprising the violation(s).[165]

"By reason of" language appears in other federal statutes.[166] Its reading, too, is not subtle. In *Mead v. Retail Clerks Int'l Ass'n Local Union No. 830*,[167] the Ninth Circuit, for example, considered the "by reason of" language in Section 303 of the Labor Management Relations Act of 1947,[168] which is relevant here, since it was also "drawn . . . from the treble damage provision of the Clayton Act" and, like RICO, "was enacted as an alternative to" using the antitrust laws directly.[169] In *Mead*, the Court held that injury "occur[s] 'by reason of' particular unlawful conduct if such conduct 'materially contributed' to the injury . . . or was a 'substantial factor' in bringing it about. . . . "[170] The Ninth Circuit's

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[163] *Haroco*, 747 F.2d at 398.

[164] *Id.* at 398. *Accord Zervas v. Faulkner*, 861 F.2d 823, 832-35 (5th Cir. 1988); *Brandenburg v. Seidel*, 859 F.2d 1179, 1187-90 (4th Cir. 1988); *Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988).

[165] *Marshall & Illsley Trust Co. v. Pate*, 819 F.2d 806, 809 (7th Cir. 1987).

[166] *See, e.g.*, 12 U.S.C. § 1975; 15 U.S.C. § 72; 19 U.S.C. § 1671d(b) (1); 22 U.S.C. § 2399b(a); 29 U.S.C. § 186(c); 41 U.S.C. § 119; 46 U.S.C. § 1227.

[167] 523 F.2d 1371 (9th Cir. 1975).

[168] 61 Stat. 158 (1947).

[169] 523 F.2d at 1376.

[170] *Id. Accord Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990). Proximate cause is usually an issue for the jury. W. Prosser & R. Keeton, *The Law of Torts* § 41 (5th ed. 1984).

causation holding, therefore, is consistent with the language of the statute, this Court's decisions in *Sedima*[171] and *Haroco*,[172] and general jurisprudence.[173] The decision of the Ninth Circuit should be affirmed.

### 3. The "In His Business Or Property" Argument Ought To Be Rejected As Not Within The Grant of Certiorari.

Holmes and the amici suggest that SIPC cannot meet the requirement of Section 1964(c) that injury by reason of a violation of Section 1962 be to "his business or property."[174] This argument is raised here for the first time. It, too, ought to be rejected.[175]

### 4. The "In His Business Or Property" Argument Ought To Be Rejected, Since SIPC Has Such Standing Under Well-Settled Principles Of Law.

SIPC and its Trustees sought recovery for injury in the form of damages for advances made to the Trustees for the payment of net equity claims made to customers; for damages to that portion of the fund of customer property to which

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[171] 473 U.S. at 493-99 (rejecting racketeering injury limitation). Indeed, to the degree that Holmes and the amici would add "purchaser-seller" as words of limitation to the text of Section 1964(c) ("by reason of, *but only against a purchaser or seller*"), their argument is little more than a variation of the racketeering injury limitation that this Court squarely rejected in *Sedima*.

[172] 473 U.S. at 609 ("To the extent petitioners' argument is a variation on the racketeering injury concept at issue in *Sedima* . . . , it is inconsistent with that decision. . . . [and] we reject [it].").

[173] *See* Blakey, *Foreword: Debunking RICO's Myriad Myths*, 64 St. John's L. Rev. 701, 721 n.111 (1990) (statutes and cases collected on civil liability flowing from conspiracy).

[174] *Holmes' Brief* at 9-16; *Firms' Brief* at 9-18; *Institute's Brief* at 16-17.

[175] *See Haroco*, 473 U.S. at 608.



SIPC was subordinated to the claims of customers; for damages for costs and expenses of administration of liquidation (including those paid with estate assets and those paid with advances by SIPC); for damages to that portion of the debtors' estates available to satisfy creditor claims, subordinated lenders and shareholders; and for destruction of the businesses of the debtors.[176]

The standing of the Trustees to sue for damages to the debtors is beyond question.[177] The Trustees have a duty to bring claims for relief that are property of the debtors' estate.[178] The Trustees also have standing to sue as bailees of the customers' property.[179] Similarly, the standing of SIPC as "a party in interest as to all matters" is specifically conferred by statute.[180] Finally, SIPC is granted subrogation rights for

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[176] J.A. at 56-57.

[177] *See, e.g., In re Sunrise*, 916 F.2d at 889; *Kompe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th Cir. 1986); *Schacht v. Brown*, 711 F.2d 1343, 1346-50 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

[178] *See, e.g., SIPC v. Christian-Paine & Co.*, 755 F.2d 359, 360-61 (3d Cir. 1985).

[179] *Redington v. Touche Ross & Co.*, 592 F.2d 617, 624-25 (2d Cir. 1978) ("The trustee [may sue] . . . as a bailee of [the] customers' property . . . on behalf of such customers as have not been fully reimbursed by SIPC."), *rev'd on other grounds*, 442 U.S. 560 (1979), *on remand*, 612 F.2d 68 (2d Cir. 1979). The single and separate fund in possession of the debtor "is not composed of the assets of the debtor, but, rather, property of the customers." *SEC v. Albert & Maguire Sec. Co., Inc.*, 560 F.2d 569, 574 (3d Cir. 1977). As such, the "trustee is charged with administering the fund to provide maximum distribution to customers [and] . . . the trustee [may] take an assignment of the claim in order to avoid an unnecessary drain on the fund." *Id. See also Richardson v. Shaw*, 209 U.S. 365, 374-80 (1907) (customer is owner, while broker is pledgee); *Gorman v. Littlefield*, 229 U.S. 19, 23-24 (1912) (share held by broker, but owner is customer).

[180] Securities Investor Protection Act Amendments of 1978, Pub. L. No. 95-283, § 7(c), 92 Stat. 249, 259 (1978) (codified at 15 U.S.C. § 78eee(d) (1988)). The 1978 amendment was enacted so that SIPC might "carry out its proper functions as the entity charged with the administration of SIPA . . . and as the party which, to a large extent, is responsible for overseeing the funds available for use in a liquidation proceeding." S. Rep. No. 763, 95th Cong., 2d Sess. 11 (1978);

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its money paid to customers for customer claims against the debtor,[181] and it has common law rights of subrogation for its money paid to customers for customer claims against third parties.[182] Double recovery is precluded, since credit must be given for any SIPC funds paid, if the customer sues third parties in his own right.[183]

Holmes' discussion of corporations and shareholders, employees, and creditors, counties and taxpayers, insured and

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H.R. Rep. No. 746, 95th Cong., 1st Sess. 27 (1977) (identical language). The language "was drawn from section 208 of Chapter X of the Bankruptcy Act." *Id.* The legislative history cited *SEC v. Krentzman*, 397 F.2d 55 (5th Cir. 1968), that gave broad scope to Section 208. Congress intended SIPC's standing as a party in interest, therefore, to be given broad scope. As such, SIPC's standing, as a party in interest, extends to initiating suits. *See, e.g., Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1362-63 (5th Cir.), *reh'g denied*, 801 F.2d 398 (1986); *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 456 n.11 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 *and* 1207 (1983). While the SIPA program resembles a bankruptcy, SIPA "create[d] a new form of liquidation, applicable only to member firms." *SIPC v. Barbour*, 421 U.S. 412, 416 (1975).

[181] SIPA was drafted without recognizing specifically SIPC's other rights. 84 Stat. 1651 (1970). The 1978 amendment, however, expressly preserved such rights. 92 Stat. 266 (1978).

[182] *See, e.g., Redington*, 592 F.2d at 624 ("SIPC is subrogated to the right of action . . . of brokers' customers against third parties such as accountants."); *SEC v. Albert & Maguire*, 560 F.2d at 574 ("Upon payment of benefits, the trustee and SIPC stand not in the shoes of the debtor . . . but, rather, in those of the customer . . . [and] SIPC becomes subrogated to the customer's rights against third parties."). *See also id.* at 573 (trustee may recover on customers' claims against third parties, since it would augment the single and separate fund and additional money would become available to satisfy claims of all customers); *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135, 137-40, 144 (7th Cir.) (trustee under pre-SIPA law may bring Rule 10b-5 claim against third party), *cert. denied*, 396 U.S. 838 (1969); *Hooper v. Mountain State Sec. Corp.*, 282 F.2d 195, 207 (5th Cir. 1960) (trustee in bankruptcy may sue third parties), *cert. denied*, 365 U.S. 814 (1961).

[183] *See, e.g., Krusi v. Bear, Stearns & Co.*, 144 Cal. App. 3d 664, 676-78, 192 Cal. Rptr. 793, 800-02 (1983). SIPC, too, is "an indispensable party" in such suits. *Id.* at 677, 192 Cal. Rptr. at 801 (citing *Bank of Orient v. Superior Court*, 67 Cal. App. 3d 588, 594-96, 136 Cal. Rptr. 741, 744-46 (1977)).



insurer, and unions and union members[184] is new to this litigation and irrelevant.[185] In particular, it is suspect, as it does not deal with the statutory and common law relationship between customers and broker-dealers in the unique liquidation provided for by SIPA. Holmes confines his discussion to a footnote,[186] which lacks authority, much less a detailed treatment of the precedents.[187] The "in his business or property" argument of Holmes should be rejected on the merits.

### E. Holmes' Policy Arguments Are A Matter For Congress And Are Meritless.

#### 1. Policy Considerations Are For Congress.

"The short answer [to the policy arguments of Holmes and the amici] is that Congress did not write the statute that way."[188] "[W]isdom or unwisdom . . . is to be put aside in the process of interpreting a statute."[189] "Resolution of the pros

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[184] *Holmes' Brief* at 9-16.

[185] It is misleading as well. While the general rule is that creditors lack standing to sue for injury to the debtors, where the creditor is a victim of the fraud, as here, in the case of the owners of the Target Securities, such creditors have standing in their own right to sue under RICO. *See, e.g., Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989); *Ocean Energy II*, 868 F.2d at 744-47; *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100-01 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). A detailed analysis of the bases of each aspect of the damage claims must await trial on the merits. The requests, however, fall within current law. *See, e.g., Ocean Energy II*, 860 F.2d at 746-48; *Bankers Trust Co.*, 859 F.2d at 1105-07; *Alexander Grant & Co. v. Tiffany Indus. Inc.*, 770 F.2d 717, 719 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

[186] *Holmes' Brief* at 14 n.4. The amici do not discuss it at all.

[187] *See, e.g., SIPC v. Poirier*, 653 F. Supp. 63, 65-66 (D. Ore. 1986) (SIPC and SIPA trustee have standing to sue third parties for RICO violations directed at liquidated firm).

[188] *Russello*, 464 U.S. at 23 (quoting *Naftalin*, 441 U.S. at 773); *Monsanto*, 491 U.S. at 611 (quoting *Naftalin*).

[189] *Rubin v. United States*, 449 U.S. 424, 431 n.8 (1981) (quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)). *See also, Airline Pilots Ass'n Int'l v. O'Neill*, 111 S. Ct. 1127, 1135 (1991).

and cons of whether a statute should sweep broadly or narrowly is for Congress."[190] "There is no argument that Congress acted beyond its power in [enacting RICO]. That being the case, the courts are without authority to restrict the application of the statute."[191] "The fact that § 1964(c) is used against respected businesses . . . is hardly a sufficient reason for assuming that the provision is being misconstrued. . . . [If this is a] defect . . . its correction must lie with Congress."[192] "[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court. There is no more room in RICO's 'self-consciously expansive language and overall approach' for the imposition of a . . . [purchaser or seller] limitation than for [an organized crime limitation or] the amorphous 'racketeering injury' requirement. . . . "[193]

This Court properly declined to add "organized crime" to "any person"[194] and "pattern"[195] and "legitimate" to "enterprise"[196] in Section 1962. It declined to add "in an enterprise" to "any interest"[197] and "but not legal fees" to "property"[198] in Section 1963. Finally, it declined to add "only" to "sue"[199] and "racketeeringly" and "competitively" to "injury" and "convicted of" to "violation" in Section 1964.[200] The

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190 *United States v. Rodgers*, 466 U.S. 475, 484 (1984).

191 *Turkette*, 452 U.S. at 587.

192 *Sedima*, 473 U.S. at 499.

193 *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 495, 498).

194 *Sedima*, 473 U.S. at 495 (" 'any person' – not just mobsters").

195 *H.J. Inc.*, 492 U.S. at 249 ("decline the invitation to invent a rule").

196 *Turkette*, 452 U.S. at 581 ("by inserting a single word").

197 *Russello*, 464 U.S. at 20-23 ("it presumably would have done so expressly").

198 *Monsanto*, 491 U.S. at 614 ("as presently written, cannot be read any other way").

199 *Tafflin*, 110 S. Ct. at 797 ("not free to add content").

200 *Sedima*, 473 U.S. at 488 ("language . . . gives no obvious indication . . . only after a criminal conviction), 495 ("reading of the statute belies any such requirement").



argument for the addition of "purchaser-seller" to Section 1964 should fair no better.[201] If it is a good idea, Congress should do it.

### 2. The Policy Considerations Are Meritless.

#### a. Fear Of A Flood Of New RICO Litigation Is Unwarranted.

Fear of a litigation burden[202] is not a sufficient reason to alter a statutory design,[203] but it motivates lower courts.[204] The "Litigation Floodgate Myth"[205] needs, therefore, to be put to rest.

Proponents of reform say that one quarter of all civil filings contain a RICO count.[206] Since approximately 240,000 civil cases are filed each year,[207] that would mean that RICO filings are about 60,000. Yet reported RICO filings are not much more than 1,000 each year.[208] The undercount is

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201 The argument, too, should fare no better than the "continuous ownership requirement" that this Court declined to add to the *express* standing requirement of Section 16(b) of the 1934 Act in *Gollust*, 111 S. Ct. at 2180 (rejected, since not "found in the text of the statute nor . . . [its] legislative history").

202 *Holmes' Brief* at 36; *Institute's Brief* at 3, 19-20.

203 *Tower v. Glover*, 467 U.S. 914, 923 (1984).

204 *See, e.g., McCarthy v. Pacific Loan, Inc.*, 600 F. Supp. 137, 139 (D. Haw. 1984).

205 *See Myths* at 869-73.

206 *RICO Reform Act of 1989: Hearings before Subcomm. on Crime of the House Judiciary Comm.*, 101st Cong., 1st Sess. 370 (1989) (Stat. of Rep. Rick Boucher) (hereinafter "*1989 Hearings*").

207 Director of the Admin. Office of the U.S. Courts, *Annual Report* Table S-8 at 114 (1988) (hereinafter "*1988 Report*").

208 *Myths* at 1018 (data on filings from Nov. 1985 through Oct. 1989). The number tried is hardly more than a handful. *See* Hughes, *RICO Reform: How Much is Needed?* 43 Vand. L. Rev. 639, 644 (1990) ("Of the 855 Civil RICO cases closed in 1988, 389 were dismissed and 186 settled; only fourteen went to jury trial, and only eight were tried by a court.").

passed off by critics who suggest that litigators "check other claims for relief" when they file civil RICO complaints.[209] Published civil RICO opinions in 1986 indicate, however, that 28.8% included a securities filing.[210] That year 3,059 securities filings were made.[211] As such, if the reported filings are representative of the unreported filings, not more than 10,622 civil RICO filings were made in 1986, 4.2%, not 25%.

This Court's opinion in *Sedima* is said by the securities industry and the accounting profession to have opened the "floodgate."[212] In 1985, 3,266 securities cases were filed.[213] By 1988, the number, however, had *dropped* to 2,638, falling by 19%.[214] The RICO Floodgate Myth is flatly false.[215]

Concern with court dockets was expressed by those who opposed Section 1964(c) in 1970.[216] Courts ought not now

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[209] *1989 Hearings* at 210 (Stat. of Philip A. Lacovara for Coalition for Civil RICO Reform).

[210] *Equitable Relief* at 621.

[211] *1988 Report* at 186.

[212] *1985 Hearings* at 631 (securities), 255 (accounting).

[213] *1988 Report* at 186.

[214] *Id.*

[215] The clarification of the "pattern" in *H.J. Inc.* must also be considered. Post-*H.J. Inc.* litigation establishes that "pattern" is a substantial limiting factor in the use of RICO in ordinary commercial litigation. Circuit court opinions indicate that district courts regularly grant dismissals for a failure to show a "pattern", and they are regularly affirmed on appeal. *See, e.g., Arzuaga-Collazo v. Oriental Fed. Sav. Bank*, 913 F.2d 5, 6-7 (1st Cir. 1990); *Banks v. Wolk*, 918 F.2d 418, 421-23 (3d Cir. 1990); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 190-93 (5th Cir. 1990); *American Eagle Credit Corp. v. Gaskins*, 920 F.2d 352, 354-55 (6th Cir. 1990); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266-69 (7th Cir. 1990); *Lane v. Peterson*, 899 F.2d 737, 744-45 (8th Cir.), *cert. denied*, 111 S. Ct. 74 (1990); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-74 (10th Cir. 1989); *Pyramid Secur., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116-20 (D.C. Cir. 1991).

The jurisprudence on "pattern," therefore, is firming up, and this type of litigation will not continue.

[216] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970) (dissent) (burdens the courts face in terms of case loads).



resurrect a rationale for narrowing RICO that Congress rejected.[217] No court ought now reweigh the "balance" between "opposing policy arguments,"[218] strike a new "compromise,"[219] or make an effort to rewrite this "carefully crafted piece of legislation."[220]

### b. Fear Of Unjust Settlements Under RICO Is Unwarranted.

Holmes and amici present a potpourri of other policy considerations. Each may be characterized as a myth and duly labeled: The Racketeer Label Myth,[221] The Litigation Abuse Myth,[222] The Litigation Abuse Remedies Myth,[223] The Federalism Myth,[224] The Multiple Damage Myth,[225] and The Garden Variety Fraud Myth.[226]

RICO suits, with little or no merit, do not settle for extortionate amounts.[227] In fact, business people will not

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[217] *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 200-02 (1985) (improper merely to "disagree[ ] with the balance struck by Congress").

[218] *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623, *reh'g denied*, 439 U.S. 884 (1978).

[219] *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

[220] *Iannelli v. United States*, 420 U.S. 770, 789 (1975). *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1985) (litigation is not an evil).

[221] *Myths* at 875-76.

[222] *Id.* at 877-79.

[223] *Id.* at 879-81.

[224] *Id.* at 920-24.

[225] *Id.* at 916-19.

[226] *Id.* at 881-909. Further, this case presents anything but a "garden variety fraud." *See* discussion, J.A. at 124-232 (detailing Holmes' nefarious activities).

[227] *See Holmes' Brief* at 36; *Firms' Brief* at 2-3; *Institute's Brief* at 17-18. The principal basis on which this canard rests is the *Report of the Ad Hoc Civil RICO Task Force of the ABA Section on Corporations, Banking and Business Law* 69 (1985). Two factors, however, undermine the scientific credibility of the task force report: (1) the population questioned was unrepresentative of the bar, and (2) the response rate was insufficient to warrant broad generalizations. *See* D. Huff, *How To Lie With Statistics* 11-26 (sample with built-in bias), 37-52 (sample of insufficient number) (1982). The extortionate settlement opinion was volunteered by only two of the 350 respondents as grounds for repealing RICO.

settle suits that should be settled because of the RICO count.[228] Today, plaintiffs often file "silent" RICO complaints: ones not using the term "racketeer." In fact, defendants do not pay off strike suits at more than their harassment value, no matter what the theory of the complaint. Suggestions to the contrary make little economic sense.[229]

The charge that RICO is subject to litigation abuse[230] is unsupported.[231] When the Coalition for Civil RICO Reform had to document in Congress "abusive cases," the list was an embarrassment.[232] Ronald Goldstock also conducted a study of 704 RICO cases. He concluded: "RICO cases are not resulting in unwarranted judgments for plaintiffs nor are settlements being extorted. Where abuse does exist. . . . Rule 11 sanctions appear capable of serving as punishment."[233] The

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[228] A majority of seasoned litigators in the RICO area know that adding a RICO claim to a suit does not facilitate settlement; it inhibits it, particularly when a legitimate business is involved. ABA, Criminal Justice Section, *Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation*: A Report of The RICO Cases Committee 121-23 (1985). It is difficult, too, to see how adding a RICO count to a suit with little or no merit has any effect. If a plaintiff's suit has no merit, the chance of success is zero, and zero multiplied by three (or any other number) is still zero.

[229] *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[230] *Holmes' Brief* at 3-4; *Firm's Brief* at 2-3; *Institute's Brief* at 17-18.

[231] Goldsmith & Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 Vand. L. Rev. 735, 758-61 (1990).

[232] *See generally Myths* at 1021-48 (detailed analysis of list of 53 abusive cases). The list included a suit against an organized crime dominated union and a suit against an individual who had been convicted of extorting sexual favors and a percentage of a death benefit from a widow and her four children. *See id.* at 1046-47 (suit against figures in mob dominated union), 1043 (extortion).

[233] *1989 Hearings* at 613. Several Rules of Civil Procedure have a substantial and salutary impact on frivolous or meritless RICO litigation. *See* Fed. R. Civ. P. Rules 9(b), 11, 26, 56. These "tools are sufficient to reduce frivolous or meritless litigation." Judicial Conference of the U.S., *Reports of the Proceedings of the Judicial Conference of the United States* 56 (1983). *See also Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991) (inherent power to impose as sanction litigation costs on party).

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allegations of abuse are just that: allegations.[234]

Far from frustrating federalism,[235] RICO implements it.[236] Over the years, Congress, under the Commerce Clause, enacted the antitrust statutes, the money and banking statutes, labor legislation, food and drug laws, securities statutes, and

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These Rules are not only vigorously enforced, but the district courts are using a "RICO Case Statement" that requires plaintiffs to provide the court with a statement of what they expect to prove; it is then used to dismiss improper litigation. *Compare Old Time Enter., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) (order proper) *with Marriott Bros. v. Gage*, 911 F.2d 1105, 1108, 1109-11 (5th Cir. 1990) (plaintiffs bound by answer to order; copy of order set out). Rule 56, too, is now extensively used to curtail implausible claims. *Compare Matsushita*, 475 U.S. at 587 *with California Architectural Bldg. Prods. Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1471 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). "[U]pon review . . . RICO abuse is not a serious problem for our legal system so long as counsel and courts appreciate the utility of existing remedial procedures. Accordingly, both Congress and the courts should recognize that abuse arguments are more likely motivated by hostility to the RICO remedy." Goldsmith and Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. Rev. 55, 103-04 (1986).

[234] *See also Haroco*, 747 F.2d at 399 n.16 (Cudahy, J.):

> [It is also true that] [t]he delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Similarly, studies under the antitrust statutes show that most treble damage suits are now settled at close to actual damages. Staff Of The House Comm. On The Judiciary, 98th Cong., 2d Sess., *Study Of The Antitrust Treble Damage Remedy*, Serial No. 8, House Comm. On The Judiciary, 98th Cong., 2d Sess. 14 (1984). A similar pattern is developing under RICO. *See Myths* at 919 n.189 (detailed analysis of the considerations of economics and justice in bringing and settling complex RICO litigation).

[235] *Institute's Brief* at 23.

[236] *Myths* at 921 n.190 (detailed analysis of RICO and federalism). Indeed, it is hard to see how RICO is inconsistent with federalism if it is supported by the National Conference of State Legislatures, the National Association of Insurance Commissioners, and the National Association of Attorneys General. *Id.* at 857 n.14.

environmental legislation. RICO, which also rests on the Commerce Clause, fits into this twentieth century legislation.[237]

The business community fought the antitrust statutes in 1890 and 1914.[238] The securities industry and the accounting profession fought the securities statutes in the 1930's.[239] Congress enacted the securities acts because state law was inadequate to deal with "racketeering" on Wall Street.[240] Critics then, as now, falsely suggest that such legislation threatens the viability of the market and learned professions.[241] Santayana suggested that those "who cannot remember the past are condemned to repeat it."[242] The truth may be

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[237] RICO and the antitrust statutes, for example, are well-integrated. "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." C. Kaysen & D. Turner, *Antitrust Policy* 17 (1959). RICO focuses on the first two; antitrust focuses on the third. As the antitrust laws seek to maintain economic freedom in the market place, so, too, RICO seeks to promote integrity in the market place, physical or fiscal.

[238] *See Equitable Relief* at 562 n.181 (Sherman Act), n.182 (Clayton Act).

[239] *See generally, id.* at 562 n.183 (securities acts); J. Seligman, *The Transformation of Wall Street* 79 (1983); Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 30 (1959). The Securities Act of 1933 encountered both open and undercover resistance from brokers and investment bankers. The president of the New York Stock Exchange led the fight against securities regulation by the federal government. J. Seligman, *supra*, at 90. In addition, Price Waterhouse & Co. was "opposed to . . . requirements for independent accountants." Landis, *supra*, at 35 n.12. The Investment Bankers Association issued a statement decrying the Act and asserting that its "practical results . . . [would] be to suspend the underwriting or distribution of many capital issues. . . . " *Id.* at 40 n.18. The 1933 Act then, like RICO today, was subject to "misinterpretation, deliberate to a great degree, by the widely publicized utterances of persons prominent in the financial world together with their lawyers." *Id.*

[240] *See, e.g.*, 77 Cong. Rec. 3801 (1933) (stat. of Sen. Duncan Fletcher, leading sponsor of the Securities Act of 1933) (the Securities Act is "designed to protect the public from financial racketeering of . . . 'investment bankers' . . . ").

[241] *Institute's Brief* at 21-22.

[242] G. Santayana, *The Life Of Reason* 284 (2d ed. 1922).



what history teaches is "that people and governments never learn anything from history."[243]

Multiple damage suits do not frustrate justice; they make it possible.[244] Indeed, studies show that private enforcement is the key to the antitrust statutes[245] and that treble damages are the backbone of private enforcement.[246] Fraud litigation, too, requires treble damages.[247]

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[243] G. Hegel, *The Philosophy Of History* 6 (J. Sibree trans. rev. ed. 1900).

[244] *See Equitable Relief* at 537 n.17 (history of idea of treble damages, adoption in other federal statutes, and economic analysis of wisdom, particularly in fraud area); Note, *Treble Damages Under RICO: Characterization and Computation*, 61 Notre Dame L. Rev. 526, 533-34 (1986):

> Treble damages have unique characteristics that can be creatively used to address the problems of sophisticated crime. Treble damages can be used to (1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.

[245] Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 84% were instituted by private plaintiffs. U.S. Dept of Justice, *Source Book of Criminal Justice Statistics* 431 (1981).

[246] *See, e.g.*, Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. Pol. Econ. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a credible threat to colluding firms. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages. . . . ").

[247] *See Mosler v. S/P Enters., Inc.*, 888 F.2d 1138, 1143-44 (7th Cir. 1989) (RICO fraud) (Easterbrook, J.):

> Because [such] frauds are concealable, trebling is important to produce proper incentives. (Citations omitted.) If perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling [under RICO] addresses both halves of this equation.

Finally, the Attorney General[248] estimated in 1985 the cost of white-collar crime at $200 billion. Fraud, in short, is not a "garden variety"[249] problem,[250] but however it is labeled, it cries out to be "weeded".[251] The 1985 estimate, too, came before the revelations in the securities, thrift, and banking industries, among pension funds, and in the insurance field.[252] SIPC's role in the securities industry is paralleled by

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[248] 1985 *Att'y Gen. Ann. Rep.* 42.

[249] *Institute's Brief* at 23.

[250] Commissioner Philip A. Feigin aptly observed:

> Euphemisms like . . . "garden variety frauds" . . . are sanitized phrases . . . used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks.

*1985 Hearings* at 535 (Testimony of Philip A. Feigin, Assistant Securities Commissioner, Colorado Division of Securities, and Chair, Special Projects Committee, Enforcement Section, North American Securities Administrators Association, Inc.).

[251] *See Furman v. Cirrito*, 741 F.2d 524, 528-29 (2d Cir. 1984), *vacated on other grounds*, 473 U.S. 922 (1985):

> Despite the clarity of congress' language [in drafting RICO] defendants argue that since RICO's primary purpose is to eradicate organized crime, it is [not] directed . . . against businessmen engaged in 'garden variety fraud'. . . . While RICO's primary focus may have been on organized crime, when considering the statute congress also recognized that fraud is a pervasive problem throughout our society . . . which causes billions of dollars in loss each year. . . . congress further acknowledged that existing state and federal law was not capable of dealing with this problem.
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> * * *
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> When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an 'enterprise' through a 'pattern of racketeering activity,' it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as 'garden variety fraud,' we can only conclude that by the RICO statute congress has provided an additional means to weed that 'garden' of its fraud.

[252] The type of argument advanced by the amici for the adoption of a purchaser-seller limitation from silence in the legislative history was aptly described by this Court as a "dog-that-did-not-bark" theory. *Harrison*, 446 U.S. at

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government programs in the thrift and banking industry,[253]

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592. The accounting profession itself, however, is a "dog that did not bark" in the current thrift debacle. *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) ("what is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case"); *Myths* at 903-05 (reviewing the general literature on the role of false financial reporting in the thrift and other financial scandals.). The accounting profession, in short, suggests that it fears unjustifiable suits. *Institute's Brief* at 18-21. The facts of the current financial scandals support it fearing justifiable efforts to hold it accountable.

The profession also seeks to support its position with reference to the powerful rhetoric of Justice Cardozo in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 189, 174 N.E. 441, 444 (1931) ("liability in an indeterminate amount for an indeterminate time to an indeterminable class"). Several comments are in order.

First, the privity rule of *Ultramares* circumscribed malpractice (contract), not fraud (tort) liability, 255 N.Y. at 189, 174 N.E. at 448; RICO, on the other hand, deals with fraud (intent to defraud), not negligence (should have known).

Second, the privity rule is not unanimous. *See, e.g., H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 350, 461 A.2d 138, 152 (1983) (privity rule no longer followed) ("may cause accounting firms to engage in more thorough reviews . . . setting up stricter standards and applying closer supervision, which should . . . reduce the . . . instances in which liability would ensue"); Note, *Who Should Pay When Federally Insured Pension Funds Go Broke? A Strategy For Recovering From Wrongdoers*, 65 Notre Dame L. Rev. 308, 331 n.141 (1990) (case law development traced).

Third, unlike private litigants, SIPC vindicates public interests. *See supra* n. 17. The policy concerns that led this Court to adopt a purchaser-seller limitation in *Blue Chip* do not apply. Under SIPA, SIPC only pays customer claims when they are verified. *See* discussion *supra* nn. 23-25. In litigation by SIPC, the liability is concrete, fixed in amount, definite as to time, and does not depend on "plaintiff's capacity to manufacture claims of hypothetical action, unrestrained by independent evidence." *Virginia Bankshares*, 59 U.S.L.W. at 4889.

Sadly, *Blue Chip* stands as an unwarranted obstacle to SIPC's ability to preserve and restore its congressionally-mandated trust fund. *See Vigman*, 803 F.2d at 1519 ("Until the Supreme Court repudiates it, we are unable to do so"). As a Congressionally-created corporation, SIPC should be allowed, under Rule 10b-5, to bring wrongdoers to account for the collapse of broker-dealers, the loss of customer property, and the drain on the SIPC Fund, without regard to *Blue Chip*.

[253] Both the RTC and FDIC use RICO in carefully selected bank fraud litigation. *See, e.g., FSLIC v. Shearson-American Express, Inc.*, 658 F. Supp. 1331 (D.P.R. 1987); *FDIC v. Hardin*, 608 F. Supp. 348 (E.D. Tenn. 1985).

the pension field,[254] and the insurance industry.[255] The key element in each of these areas is trust,[256] which is ultimately a question of integrity. If anything, therefore, policy considerations argue for strengthening, not weakening, those laws that effectively underwrite integrity.

## CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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254 *See, e.g., Thornton v. Evans*, 692 F.2d 1064, 1065 (7th Cir. 1982) (pension plan fraud) ("Evidence . . . traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence."). RICO is being used successfully on behalf of plan beneficiaries. *See, e.g., Crawford v. LaBoucherie Bernard Ltd.*, No. 83-0780 (D.D.C. Aug. 15, 1984), *aff'd*, 815 F.2d 117 (D.C. Cir.), *cert. denied*, 484 U.S. 943 (1987).

255 State insurance commissioners are using RICO to vindicate the interests of the companies that have been defrauded. *See, e.g., Schacht*, 711 F.2d at 1356-58; *North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746, 749-51 (E.D.N.C. 1988).

256 On the sad state of "trust" in the business community today, *see Myths* at 917 n.175.



# APPENDIX OF STATUTES AND REGULATIONS

## RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT
(18 U.S.C. §§ 1961-68)

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), sections 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with

commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), and section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political



subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether

any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

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§ 1962. Prohibited Activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the

activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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§ 1963. Criminal Penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provisions of State law–

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any–

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from

an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or



(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

*Provided, however,* That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party

against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interest of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for



the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its deposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to –

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to –

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the



proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any persons with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may –

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property

forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.



(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeitures invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) ~~If any~~ of the property described in subsection (a), as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

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§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the

criminal offense in any subsequent civil proceeding brought by the United States.

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§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

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§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

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§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

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§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall –

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall –

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or



(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by –

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served

shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such



attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of –

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any

documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly –

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.



(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

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§ 78aaa. Short title

This chapter may be cited as the "Securities Investor Protection Act of 1970".

## SECURITIES INVESTOR PROTECTION ACT

(15 U.S.C. §§ 78aaa – 78111).

§ 78bbb. Application of Securities Act of 1934

Except as otherwise provided in this chapter, the provisions of the Securities Exchange Act of 1934 (hereinafter referred to as the "1934 Act") apply as if this chapter constituted an amendment to, and was included as a section of, such Act.

§ 78ccc. Securities Investor Protection Corporation

(a) Creation and membership. –

(1) Creation. – There is hereby established a body corporate to be known as the "Securities Investor Protection Corporation" (hereafter in this chapter referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by Act of Congress. SIPC shall –

(A) not be an agency or establishment of the United States Government; and

(B) except as otherwise provided in this chapter, be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act (D.C. Code, section 29-1001 and fol.).



(2) Membership. –

(A) Members of SIPC. – SIPC shall be a membership corporation the members of which shall be all persons registered as brokers or dealers under section 78o(b) of this title, other than –

(i) persons whose principal business, in the determination of SIPC, taking into account business of affiliated entities, is conducted outside the United States and its territories and possessions; and

(ii) persons whose business as a broker or dealer consists exclusively of (I) the distribution of shares of registered open and investment companies or unit investment trusts, (II) the sale of variable annuities, (III) the business of insurance, or (IV) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts.

(B) Commission review. – SIPC shall file with the Commission a copy of any determination made pursuant to subparagraph (A)(i). Within thirty days after the date of such filing, or within such longer period as the commission may designate of not more than ninety days after such date if it finds such longer period to be appropriate and publishes its reasons for so finding, the Commission shall, consistent with the public interest and the purposes of this chapter, affirm, reverse, or amend any such determination of SIPC.

(C) Additional members. – SIPC shall provide by rule that persons excluded from

membership in SIPC under subparagraph (A)(i) may become members of SIPC under such conditions and upon such terms as SIPC shall require by rule, taking into account such matters as the availability of assets and the ability to conduct a liquidation if necessary.

(D) Disclosure. – Any broker or dealer excluded from membership in SIPC under subparagraph (A)(i) shall, as required by the Commission by rule, make disclosures of its exclusion and other relevant information to the customers of such broker or dealer who are living in the United States or its territories and possessions.

(b) Powers. – In addition to the powers granted to SIPC elsewhere in this chapter, SIPC shall have the power

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any State, Federal, or other court;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal, by its Board of Directors, such bylaws as may be necessary or appropriate to carry out the purposes of this chapter, including bylaws relating to –

(A) the conduct of its business; and

(B) the indemnity of its directors, officers, and employees (including any such person acting as trustee or otherwise in connection with a liquidation proceeding) for liabilities and expenses actually and reasonably incurred by any such person in connection with the defense or settlement of an action or suit if such person acted in good



faith and in a manner reasonably believed to be consistent with the purposes of this chapter.

(4) to adopt, amend, and repeal, by its Board of Directors, such rules as may be necessary or appropriate to carry out the purposes of this chapter including rules relating to –

(A) the definition of terms used in this chapter, other than those terms for which a definition is provided in section 78*lll* of this title;

(B) the procedures for the liquidation of members and direct payment procedures, including the transfer of customer accounts, the distribution of customer property, and the advance and payment of SIPC funds; and

(C) the exercise of all other rights and powers granted to it by this chapter;

(5) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this chapter in any State or other jurisdiction without regard to any qualification, licensing, or other statute in such State or other jurisdiction;

(6) to lease, purchase, accept gifts or donations of or otherwise acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease exchange or otherwise dispose of, any property, real, personal or mixed, or any interest therein, wherever situated;

(7) subject to the provisions of subsection (c) of this section, to elect or appoint such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to

define their duties, to fix their salaries, require bonds for them and fix the penalty thereof;

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to SIPC by this chapter; and

(9) by bylaw, to establish its fiscal year.

(c) Board of Directors. –

(1) Functions. – SIPC shall have a Board of Directors which, subject to the provisions of this chapter, shall determine the policies which shall govern the operations of SIPC.

(2) Number and appointment. – The Board of Directors shall consist of seven persons as follows:

(A) One director shall be appointed by the Secretary of the Treasury from among the officers and employees of the Department of the Treasury.

(B) One director shall be appointed by the Federal Reserve Board from among the officers and employees of the Federal Reserve Board.

(C) Five directors shall be appointed by the President, by and with the advice and consent of the Senate, as follows –

(i) three such directors shall be selected from among persons who are associated with, and representative of different aspects of, the securities industry, not all of whom shall be from the geographical area of the United States, and



(ii) two such directors shall be selected from the general public from among persons who are not associated with a broker or dealer or associated with a member of a national securities exchange, within the meaning of section 78c(a)(18) or section 78c(a)(21), respectively, of this title, or similarly associated with any self-regulatory organization or other securities industry group, and who have not had any such association during the two years preceding appointment.

(3) Chairman and vice chairman. – The President shall designate a Chairman and Vice Chairman from among those directors appointed under paragraph (2)(C)(ii) of this subsection.

(4) Terms. –

(A) Except as provided in subparagraphs (B) and (C), each director shall be appointed for a term of three years.

(B) Of the directors first appointed under paragraph (2) –

(i) two shall hold office for a term expiring on December 31, 1971,

(ii) two shall hold office for a term expiring on December 31, 1972; and

(iii) three shall hold office for a term expiring on December 31, 1973,

as designated by the President at the time they take office. Such designation shall be made in a manner which will assure that no two persons appointed under the authority of the same clause of paragraph (2)(C) shall have terms which expire simultaneously.

(C) A vacancy in the Board shall be filled in the same manner as the original appointment was made. Any director appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A director may serve after the expiration of his term until his successor has taken office.

(5) Compensation. – All matters relating to compensation of directors shall be as provided in the bylaws of SIPC.

(d) Meetings of Board. – The Board of Directors shall meet at the call of its Chairman, or as otherwise provided by the bylaws of SIPC.

(e) Bylaws and rules. –

(1) Proposed bylaw changes. – The Board of Directors of SIPC shall file with the Commission a copy of any proposed bylaw or any proposed amendment to or appeal of any bylaw of SIPC (hereinafter in this paragraph collectively referred to as a "proposed bylaw change"), accompanied by a concise general statement of the basis and purpose of such proposed bylaw change. Each such proposed bylaw change shall take effect thirty days after the date of the filing of a copy thereof with the commission, or upon such later date as SIPC may designate or such earlier date as the Commission may determine, unless

(A) the Commission, by notice to SIPC setting forth the reasons therefor, disapproves such proposed bylaw change as being contrary to the public interest or contrary to the purposes of this chapter; or

(B) the Commission finds that such proposed bylaw change involves a matter of



such significant public interest that public comment should be obtained, in which case it may, after notifying SIPC in writing of such finding, require that the procedures set forth in paragraph (2) be followed with respect to such proposed bylaw change, in the same manner as if such proposed bylaw change were a proposed rule change within the meaning of such paragraph.

(2) Proposed rule changes. –

(A) Filing of proposed rule changes. – The Board of Directors of SIPC shall file with the Commission, in accordance with such rules as the Commission may prescribe, a copy of any proposed rule or any proposed amendment to or repeal of any rule of SIPC (hereinafter in this subsection collectively referred to as a "proposed rule change"), accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof, together with the terms of substance of such proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments with respect to such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this paragraph.

(B) Action by the Commission. – Within thirty-five days after the date of publication of notice of the filing of a proposed rule change, or within such longer period as the Commission may designate of not more than ninety days after such date if

it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which SIPC consents, the Commission shall –

(i) by order approve such proposed rule change; or

(ii) institute proceedings to determine whether such proposed rule change should be disapproved.

(C) Proceedings. – Proceedings instituted with respect to a proposed rule change pursuant to subparagraph (B)(ii) shall include notice of the grounds for disapproval under consideration and opportunity for hearing, and shall be concluded within one hundred eighty days after the date of publication of notice of the filing of such proposed rule change. At the conclusion of such proceedings, the Commission shall, by order, approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for not more than sixty days if it finds good cause for such extension and publishes its reasons for so finding, or for such longer period as to which SIPC consents.

(D) Grounds for approval or disapproval. – The Commission shall approve a proposed rule change if it finds that such proposed rule change is in the public interest and is consistent with the purposes of this chapter, and any proposed rule change so approved shall be given force and effect as if promulgated by the Commission. The Commission shall disapprove a proposed rule change if it does not make the finding referred to in the preceding sentence. The commission shall not approve any proposed



rule change prior to thirty days after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(E) Exception. – Notwithstanding any other provision of this paragraph, a proposed rule change may take effect –

(i) upon the date of filing with the Commission, if such proposed rule change is designated by SIPC as relating solely to matters which the Commission, consistent with the public interest and the purposes of this subsection, determines by rule do not require the procedures set forth in this paragraph; or

(ii) upon such date as the Commission shall for good cause determine. Any proposed rule change which takes effect under this clause shall be filed promptly thereafter and reviewed in accordance with the provisions of subparagraph (A).

At any time within sixty days after the date of filing of any rule change which has taken effect pursuant to this subparagraph, the Commission may summarily abrogate such rule change and require that it be refiled and reviewed in accordance with the provisions of this paragraph, if the commission finds that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. Any action of the Commission pursuant to the preceding sentence shall not affect the validity or force of a rule change during the period it was in effect and shall not be reviewable under section 78y of this title or deemed to be final

agency action for purposes of section 704 of Title 5.

(3) Action required by Commission. – The Commission may, by such rules as it determines to be necessary or appropriate in the public interest or to carry out the purposes of this chapter, require SIPC to adopt, amend, or repeal any SIPC bylaw or rule, whenever adopted.

§ 78ddd. SIPC Fund

(a) In general. –

(1) Establishment of fund. – SIPC shall establish a "SIPC Fund" (hereinafter in this chapter referred to as the "fund"). All amounts received by SIPC (other than amounts paid directly to any lender pursuant to any pledge securing a borrowing by SIPC) shall be deposited in the fund, and all expenditures made by SIPC shall be made out of the fund.

(2) Balance of the fund. – Except as otherwise provided in this section, the balance of the fund at any time shall consist of the aggregate at such time of the following items:

(A) Cash on hand or on deposit.

(B) Amounts invested in United States Government or agency securities.

(C) Such confirmed lines of credit as SIPC may from time to time maintain, other than those maintained pursuant to paragraph (4).

(3) Confirmed lines of credit. – For purposes of this section, the amount of confirmed lines of credit as of any time is the aggregate amount which SIPC at such time has the right to borrow from banks and other financial institutions under confirmed lines of credit or other



written agreements which provide that moneys so borrowed are to be repayable by SIPC not less than one year from the time of such borrowings (including, for purposes of determining when such moneys are repayable, all rights of extension, refunding, or renewal at the election of SIPC).

(4) Other lines. – SIPC maintain such other confirmed lines of credit as it considers necessary or appropriate, and such other confirmed lines of credit shall not be included in the balance of the fund, but amounts received from such lines of credit may be disbursed by SIPC under this chapter as though such amounts were part of the fund.

(b) Initial required balance for fund. – Within one hundred and twenty days from December 30, 1970, the balance of the fund shall aggregate not less than $75,000,000 less any amounts expended from the fund within that period.

(c) Assessments. –

(1) Initial assessments. – Each member of SIPC shall pay to SIPC, or the collection agent for SIPC specified in section 78iii(a) of this title, on or before the one hundred and twentieth day following December 30, 1970, an assessment equal to one-eighth of 1 per centum of the gross revenues from the securities business of such member during the calendar year 1969, or if the commission shall determine that, for purposes of assessment pursuant to this paragraph, a lesser percentage of gross revenues from the securities business is appropriate for any class or classes of members (taking into account relevant factors, including but not limited to types of business done and nature of securities sold), such lesser percentages as the Commission, by

rule or regulation, shall establish for such class or classes, but in no event less than one-sixteenth of 1 per centum for any such class. In no event shall any assessment upon a member pursuant to this paragraph be less than $150.

(2) General assessment authority. – SIPC shall, by bylaw, impose upon its members such assessments as, after consultation with self-regulatory organizations, SIPC may deem necessary and appropriate to establish and maintain the fund and to repay any borrowings by SIPC. Any assessments so made shall be in conformity with contractual obligations made by SIPC in connection with any borrowing incurred by SIPC. Subject to paragraph (3) and subsection (d)(1)(A) of this section, any such assessment upon the members, or any one or more classes thereof, may, in whole or in part, be based upon or measured by (A) the amount of their gross revenues from the securities business, or (B) all or any of the following factors: the amount or composition of their gross revenues from the securities business, the number or dollar volume of transactions effected by them, the number of customer accounts maintained by them or the amounts of cash and securities in such accounts, their net capital, the nature of their activities (whether in the securities business or otherwise) and the consequent risks, or other relevant factors.

(3) Limitations. – Notwithstanding any other provision of this chapter –

(A) no assessment shall be made upon a member otherwise than pursuant to paragraph (1) or (2) of this subsection,

(B) an assessment may be made under paragraph (2) of this subsection at a rate in excess of one-half of one per centum during



any twelve-month period if SIPC determines, in accordance with a bylaw, that such rate of assessment during such period will not have a material adverse effect on the financial condition of its members or their customers, except that no assessments shall be made pursuant to such paragraph upon a member which require payments during any such period which exceed in the aggregate one per centum of such member's gross revenues from the securities business for such period, and

(C) no assessment shall include any charge based upon the member's activities (i) in the distribution of shares of registered open end investment companies or unit investment trusts, (ii) in the sale of variable annuities, (iii) in the business of insurance, or (iv) in the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts.

(d) Requirements respecting assessments and lines of credit. –

(1) Assessments. –

(A) ½ of 1 percent assessment. – Subject to subsection (c)(3) of this section, SIPC shall impose upon each of its members an assessment at a rate of not less than one-half of 1 per centum per annum of the gross revenues from the securities business of such member –

(i) until the balance of the fund aggregates not less than $150,000,000 (or such other amount as the Commission may determine in the public interest),

(ii) during any period when there is outstanding borrowing by SIPC pursuant to subsection (f) or subsection (g) of this section, and

(iii) whenever the balance of the fund (exclusive of confirmed lines of credit) is below $100,000,000 (or such other amount as the Commission may determine in the public interest).

(B) 1/4 of 1 percent assessment. – During any period during which –

(i) the balance of the fund (exclusive of confirmed lines of credit) aggregates less than $150,000,000 (or such other amount as the Commission has determined under paragraph (2)(B)), or

(ii) SIPC is required under paragraph (2)(B) to phase out of the fund all confirmed lines of credit,

SIPC shall endeavor to make assessments in such a manner that the aggregate assessments payable by its members during such period shall not be less than one-fourth of 1 per centum per annum of the aggregate gross revenues from the securities business for such members during such period.

(C) Minimum assessment. – The minimum assessment imposed upon each member of SIPC shall be $25 per annum through the year ending December 31, 1979, and thereafter shall be the amount from time to time set by SIPC bylaw, but in no event shall the minimum assessment be greater than $150 per annum.

(2) Lines of credit. –

(A) $50,000,000 limit after 1973. – After December 31, 1973, confirmed lines of credit shall not constitute more than $50,000,000 of the balance of the fund.



(B) Phaseout requirement. – When the balance of the fund aggregates $150,000,000 (or such other amount as the Commission may determine in the public interest) SIPC shall phase out of the fund all confirmed lines of credit.

(e) Prior trusts; overpayments and underpayments. –

(1) Prior trusts. – There may be contributed and transferred at any time to SIPC any funds held by any trust established by a self-regulatory organization prior to January 1, 1970, and the amounts so contributed and transferred shall be applied, as may be determined by SIPC with approval of the Commission, as a reduction in the amounts payable pursuant to assessments made or to be made by SIPC upon members of such self-regulatory organization pursuant to subsection (c)(2) of this section. No such reduction shall be made at any time when there is outstanding any borrowing of SIPC pursuant to subsection (g) of this section or any borrowings under confirmed lines of credit.

(2) Overpayments. – To the extent that any payment by a member exceeds the maximum rate permitted by subsection (c) of this section, the excess shall be recoverable only against future payments by such member, except as otherwise provided by SIPC bylaw.

(3) Underpayments. – If a member fails to pay when due all or any part of an assessment made upon such member, the unpaid portion thereof shall bear interest at such rate as may be determined by SIPC bylaw and, in addition to such interest, SIPC may impose such penalty charge as may be determined by SIPC bylaw. Any such penalty charge imposed upon a SIPC member shall not exceed 25 per centum of any unpaid portion of the assessment. SIPC may

waive such penalty charge in whole or in part in circumstance where it considers such waiver appropriate.

(f) Borrowing authority. – SIPC shall have the power to borrow moneys and to evidence such borrowed moneys by the issuance of bonds, notes, or other evidences of indebtedness, all upon such terms and conditions as the Board of Directors may determine in the case of a borrowing other than pursuant to subsection (g) of this section, or as may be prescribed by the Commission in the case of a borrowing pursuant to subsection (g) of this section. The interest payable on a borrowing pursuant to subsection (g) of this section shall be equal to the interest payable on the related notes or other obligations issued by the Commission to the Secretary of the Treasury. To secure the payment of the principal of, and interest and premium, if any, on, all bonds, notes, or other evidences of indebtedness so issued, SIPC may make agreements with respect to the amount of future assessments to be made upon members and may pledge all or any part of the assets of SIPC and of the assessments made or to be made upon members. Any such pledge of future assessments shall (subject to any prior pledge) be valid and binding from the time that it is made, and the assessments so pledged and thereafter received by SIPC, or any collection agent for SIPC, shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of such pledge shall be valid and binding against all parties having claims of any kind against SIPC or such collection agent whether pursuant to this chapter, in tort, contract or otherwise, irrespective of whether such parties have notice thereof. During any period when a borrowing by



SIPC pursuant to subsection (g) of this section is outstanding, no pledge of any assessment upon a member to secure any bonds, notes, or other evidences of indebtedness issued other than pursuant to subsection (g) of this section shall be effective as to the excess of the payments under the assessment on such member during any twelve-month period over one-fourth of 1 per centum of such member's gross revenues from the securities business for such period. Neither the instrument by which a pledge is authorized or created, nor any statement or other document relative thereto, need be filed or recorded in any State or other jurisdiction. The Commission may by rule or regulation provide for the filing of any instrument by which a pledge or borrowing is authorized or created, but the failure to make or any defect in any such filing shall not affect the validity of such pledge or borrowing.

(g) SEC Loans to SIPC. – In the event that the fund is or may reasonably appear to be insufficient for the purposes of this chapter, the commission is authorized to make loans to SIPC. At the time of application for, and as a condition to, any such loan, SIPC shall file with the Commission a statement with respect to the anticipated use of the proceeds of the loan. If the commission determines that such loan is necessary for the protection of customers of brokers or dealers and the maintenance of confidence in the United States securities markets and that SIPC has submitted a plan which provides as reasonable an assurance of prompt repayment as may be feasible under the circumstances, then the Commission shall so certify to the Secretary of the Treasury, and issue notes

or other obligations to the Secretary of the Treasury pursuant to subsection (h) of this section. If the Commission determines that the amount or time for payment of the assessments pursuant to such plan would not satisfactorily provide for the repayment of such loan, it may, by rules and regulations, imposed upon the purchasers of equity securities in transactions on national securities exchanges and in the over-the-counter markets a transaction fee in such amount as at any time or from time to time it may determine to be appropriate, but not exceeding one-fiftieth of 1 per centum of the purchase price of the securities. No such fee shall be imposed on a transaction (as defined by rules or regulations of the Commission) of less than $5,000. For the purposes of the next preceding sentence, (1) the fee shall be based upon the total dollar amount of each purchase; (2) the fee shall not apply to any purchase on a national securities exchange or in an over-the-counter market by or for the account of a broker or dealer registered under section 78o(b) of this title unless such purchase is for an investment account of such broker or dealer (and for this purpose any transfer from a trading account to an investment account shall be deemed a purchase at fair market value); and (3) the Commission may, by rule, exempt any transaction in the over-the-counter markets or on any national securities exchange where necessary to provide for the assessment of fees on purchasers in transactions in such markets and exchanges on a comparable basis. Such fee shall be collected by the broker or dealer effecting the transaction for or with the purchaser, or by such other person as provided by the Commission by rule, and shall be paid to



SIPC in the same manner as assessments imposed pursuant to subsection (c) of this section but without regard to the limits on such assessments, or in such other manner as the Commission may by rule provide.

(h) SEC Notes issued to Treasury. – To enable the Commission to make loans under subsection (g) of this section, the Commission is authorized to issue to the Secretary of the Treasury notes or other obligations in an aggregate amount of not to exceed $1,000,000,000, in such forms and denominations, bearing such maturities, and subject to such terms and conditions, as may be prescribed by the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury may reduce the interest rate if he determines such reduction to be in the national interest. The Secretary of the Treasury is authorized and directed to purchase any notes and other obligations issued hereunder and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under that chapter are extended to include any purchase of such notes and obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this

subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States.

(i) Consolidated group. – Except as otherwise provided by SIPC bylaw, gross revenues from the securities business of a member of SIPC, shall be computed on a consolidated basis for such member and all its subsidiaries (other than the foreign subsidiaries of such member), and the operations of a member of SIPC shall include those of any business to which such member has succeeded.

§ 78eee. Protection of customers

(a) Determination of need of protection.

(1) Notice to SIPC. – If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission.

(2) Action by self-regulatory organization. – If a self-regulatory organization has given notice to SIPC pursuant to subsection (a)(1) of this section with respect to a broker or dealer, and such broker or dealer undertakes to liquidate or reduce its business either pursuant to the direction of a self-regulatory organization or voluntarily, such self-regulatory organization may render such assistance or oversight to such broker or dealer as it considers appropriate to protect the interests of customers of such broker or dealer. The assistance or oversight by a self-regulatory organization shall not be deemed the assumption or adoption by such self-regulatory



organization of any obligation or liability to customers, other creditors, shareholders, or partners of the broker or dealer, and shall not prevent or act as a bar to any action by SIPC.

(3) Action by SIPC. – If SIPC determines that –

(A) any member of SIPC (including any person who was a member within one hundred eighty days prior to such determination) has failed or is in danger of failing to meet its obligations to customers; and

(B) one or more of the conditions specified in subsection (b)(1) of this section exist with respect to such member, SIPC may, upon notice to such member, file an application for a protective decree with any court of competent jurisdiction specified in section 78u(e) or 78aa of this title, except that no such application shall be filed with respect to a member the only customers of which are persons whose claims could not be satisfied by SIPC advances pursuant to section 78fff-3 of this title.

(4) Effect of other pending actions. – An application with respect to a member of SIPC filed with a court under paragraph (3) –

(A) may, with consent of the Commission, be combined with any action brought by the Commission, including an action by the Commission for a temporary receiver pending an appointment of a trustee under subsection (b)(3) of this section; and

(B) may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding or any proceeding to reorganize, conserve, or liquidate

such member or its property, or any proceeding to enforce a lien against property of such member.

(b) Court action. –

(1) Issuance of protective decree. – Upon receipt of an application by SIPC under subsection (a)(3) of this section, the court shall forthwith issue a protective decree if the debtor consents thereto, if the debtor fails to contest such application, or if the court finds that such debtor –

(A) is insolvent within the meaning of section 101 of Title 11, or is unable to meet its obligations as they mature;

(B) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed;

(C) is not in compliance with applicable requirements under the 1934 Act or rules of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities; or

(D) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules.

Unless the debtor consents to the issuance of a protective decree, the application shall be heard three business days after the date on which it is filed, or at such other time as the court shall determine, taking into consideration the urgency which the circumstances require.



(2) Jurisdiction and powers of court. –

(A) Exclusive jurisdiction. – Upon the filing of an application with a court for a protective decree with respect to a debtor, such court –

(i) shall have exclusive jurisdiction of such debtor and its property wherever located (including property located outside the territorial limits of such court and property held by any other person as security for a debt or subject to a lien);

(ii) shall have exclusive jurisdiction of any suit against the trustee with respect to a liquidation proceeding; and

(iii) except as inconsistent with the provisions of this chapter, shall have the jurisdiction, powers, and duties conferred upon a court of the United States having jurisdiction over cases under Title 11, together with such other jurisdiction, powers, and duties as are prescribed by this chapter.

(B) Stay of pending actions. – Pending the issuance of a protective decree under paragraph (1), the court with which an application has been filed –

(i) shall stay any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the debtor or its property and any other suit against any receiver, conservator, or trustee of the debtor or its property, and shall continue such stay upon appointment of a trustee pursuant to paragraph (3);

(ii) may stay any proceeding to enforce a lien against property of the debtor or any other suit against the debtor, including a suit by stockholders of the debtor which interferes with prosecution by the trustee of claims against former directors, officers, or employees of the debtor, and may continue such stay upon appointment of a trustee pursuant to paragraph (3);

(iii) may stay enforcement of, and upon appointment of a trustee pursuant to paragraph (3), may continue the stay for such period of time as may be appropriate, but shall not abrogate any right of setoff, except to the extent such right may be affected under section 553 of Title 11, and shall not abrogate the right to enforce a valid, nonpreferential lien or pledge against the property of the debtor; and

(iv) may appoint a temporary receiver.

(3) Appointment of trustee and attorney. – If the court issues a protective decree under paragraph (1), such court shall forthwith appoint, as trustee for the liquidation of the business of the debtor and as attorney for the trustee, such persons as SIPC, in its sole discretion, specifies. The persons appointed as trustee and as attorney for the trustee may be associated with the same firm. SIPC may, in its sole discretion, specify itself or one if its employees as trustee in any case in which SIPC has determined that the liabilities of the debtor to unsecured general creditors and to subordinated lenders appear to aggregate less than $750,000 and that there appear to be fewer than five hundred customers of such debtor. No person



may be appointed to serve as trustee or attorney for the trustee if such person is not disinterested within the meaning of paragraph (6), except that for any specified purpose other than to represent a trustee in conducting a liquidation proceeding, the trustee may, with the approval of SIPC and the court, employ an attorney who is not disinterested. A trustee appointed under this paragraph shall qualify by filing a bond in the manner prescribed by section 322 of Title 11, except that neither SIPC nor any employee of SIPC shall be required to file a bond when appointed as trustee.

(4) Removal to bankruptcy court. – Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under Title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made.

(5) Compensation for services and reimbursement of expenses. –

(A) Allowances in general. – The court shall grant reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred (hereinafter in this paragraph referred to as "allowances") by a trustee, and by the attorney for such a trustee, in connection with a liquidation proceeding. No allowances (other than reimbursement for proper costs and expenses incurred) shall be granted to SIPC or any employee of SIPC for serving as trustee. Allowances may be granted on an

interim basis during the course of the liquidation proceeding at such times and in such amounts as the court considers appropriate.

(B) Application for allowances. – Any person seeking allowances shall file with the court an application which complies in form and content with the provisions of Title 11 governing applications for allowances under such title. A copy of such application shall be served upon SIPC when filed. The court shall fix a time for a hearing on such application, and notice of such hearing shall be given to the applicant, the trustee, the debtor, the creditors, SIPC, and such other persons as the court may designate, except that notice need not be given to customers whose claims have been or will be satisfied in full or to creditors who cannot reasonably be expected to receive any distribution during the course of the liquidation proceeding.

(C) Recommendations of SIPC and awarding of allowances. – Whenever an application for allowances is filed pursuant to subparagraph (B), SIPC shall file its recommendation with respect to such allowances with the court prior to the hearing on such application and shall, if it so requests, be allowed a reasonable time after such hearing within which to file a further recommendation. In any case in which such allowances are to be paid by SIPC without reasonable expectation of recoupment thereof as provided in this chapter and there is no difference between the amounts requested and the amounts recommended by SIPC, the court shall award the amounts recommended by SIPC. In determining the amount of allowances in all other cases, the



court shall give due consideration to the nature, extent, and value of the services rendered, and shall place considerable reliance on the recommendation of SIPC.

(D) Applicable restrictions. – The restrictions on sharing of compensation set forth in section 504 of Title 11 shall apply to allowances.

(E) Charge against estate. – Allowances granted by the court, including interim allowances, shall be charged against the general estate of the debtor as a cost and expense of administration. If the general estate is insufficient to pay allowances in whole or in part, SIPC shall advance such funds as are necessary for such payment.

(6) Disinterestedness. –

(A) Standards. – For purposes of paragraph (3), a person shall not be deemed disinterested if –

(i) such person is a creditor (including a customer), stockholder, or partner of the debtor;

(ii) such persons is or was an underwriter of any of the outstanding securities of the debtor or within five years prior to the filing date as the underwriter of any securities of the debtor;

(iii) such person is, or was within two years prior to the filing date, a director, partner, officer, or employee of the debtor or such an underwriter, or an attorney for the debtor or such an underwriter; or

(iv) it appears that such person has, by reason of any other direct or

indirect relationship to, connection with, or interest in the debtor or such an underwriter, or for any other reason, an interest materially adverse to the interests of any class of creditors (including customers) or stockholders.

except the SIPC shall in all cases be deemed disinterested, and an employee of SIPC shall be deemed disinterested if such employee would, except for his association with SIPC, meet the standards set forth in this subparagraph.

(B) Hearing. – The court shall fix a time for a hearing on disinterestedness, to be held promptly after the appointment of a trustee. Notice of such hearing shall be mailed at least ten days prior thereto to each person who, from the books and records of the debtor, appears to have been a customer of the debtor with an open account within the past twelve months, to the address of such person as it appears from the books and records of the debtor, and to the creditors and stockholders of the debtor, to SIPC, and to such other persons as the court may designate. The court may, in its discretion, also require that notice be given by publication in such newspaper or newspapers of general circulation as it may designate. At such hearing, at any adjournment thereof, or upon application, the court shall hear objections to the retention in office of a trustee or attorney for a trustee on the grounds that such person is not disinterested.

(c) SEC participation in proceedings. – The Commission may, on its own motion, file notice of its appearance in



any proceeding under this chapter and may thereafter participate as a party.

(d) SIPC participation. – SIPC shall be deemed to be a party in interest as to all matters arising in a liquidation proceeding, with the right to be heard on all such matters, and shall be deemed to have intervened with respect to all such matters with the same force and effect as if a petition for such purpose had been allowed by the court.

§ 78fff. General provisions of a liquidation proceeding

(a) Purposes. – The purposes of a liquidation proceeding under this chapter shall be –

(1) as promptly as possible after the appointment of a trustee in such liquidation proceeding, and in accordance with the provisions of this chapter –

(A) to deliver customer name securities to or on behalf of the customers of the debtor entitled thereto as provided in section 78fff-2(c)(2) of this title; and

(B) to distribute customer property and (in advance thereof or concurrently therewith) otherwise satisfy net equity claims of customers to the extent provided in this section;

(2) to sell or transfer offices and other productive units of the business of the debtor;

(3) to enforce rights of subrogation as provided in this chapter; and

(4) to liquidate the business of the debtor.

(b) Application of Title 11. – To the extent consistent with the provisions of this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of Title 11. For the purposes of applying such title in carrying out this section, a reference in such title to the date of the filing of the petition shall be deemed to be a reference to the filing date under this chapter.

(c) Determination of customer status. – In a liquidation proceeding under this chapter, whenever a person has acted with respect to cash or securities with the debtor after the fling date and in a manner which would have given him the status of a customer with respect to such cash or securities had the action occurred prior to the filing date, and the trustee is satisfied that such action was taken by the customer in good faith and prior to the appointment of the trustee, the date on which such action was taken shall be deemed to be the filing date for purposes of determining the net equity of such customer with respect to such cash or securities.

(d) Apportionment. – Any liquidation proceeding under this chapter, any cash or securities remaining after the liquidation of a lien or pledge made by a debtor shall be apportioned between his general estate and customer property in the proportion in which the general property of the debtor and the cash and securities of the customers of such debtor contributed to such lien or pledge. Securities apportioned to the general estate under this subsection shall be subject to the provisions of section 78*lll*(5)(A) of this title.



(e) Costs and expenses of administration. – All costs and expenses of administration of the estate of the debtor and of the liquidation proceeding shall be borne by the general estate of the debtor to the extent it is sufficient therefor, and the priorities of distribution from the general estate shall be as provided in section 726 of Title 11. Costs and expenses of administration shall include payments pursuant to section 78fff-2(e) of this title and section 78fff-3(c)(1) of this title (to the extent such payments recovered securities which were apportioned to the general estate pursuant to subsection (d) of this section) and costs and expenses of SIPC employees utilized by the trustee pursuant to section 78fff-1(a)(2) of this title. All funds advanced by SIPC to a trustee for such costs and expenses of administration shall be recouped from the general estate under section 507(a)(1) of Title 11.

§ 78fff-1. Powers and duties of a trustee

(a) Trustee powers. – A trustee shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under Title 11. In addition, a trustee may, with the approval of SIPC but without any need for court approval –

(1) hire and fix the compensation of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including accountants) that are deemed by the trustee necessary for all or any purposes of the liquidation proceeding;

(2) utilize SIPC employees for all or any purposes of a liquidation proceeding; and

(3) margin and maintain customer accounts of the debtor for the purposes of section 78fff-2(f) of this title.

(b) Trustee duties. – To the extent consistent with the provisions of this chapter or as otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee in a case under chapter 7 of Title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7, except that a trustee may, but shall have no duty to, reduce to money any securities constituting customer property or in the general estate of the debtor. In addition, the trustee shall –

(1) deliver securities to or on behalf of customers to the maximum extent practicable in satisfaction of customer claims for securities of the same class and series of an issuer; and

(2) subject to the prior approval of SIPC but without any need for court approval, pay or guarantee all or any part of the indebtedness of the debtor to a bank, lender, or other person if the trustee determines that the aggregate market value of securities to be made available to the trustee upon the payment or guarantee of such indebtedness does not appear to be less than the total amount of such payment or guarantee.

(c) Reports by trustee to court. – The trustee shall make to the court and to SIPC such written reports as may be required of a trustee in a case under chapter 7 of Title 11, and shall include in such reports information with respect to the progress made in distributing cash and securities to customers. Such reports shall be in such form and detail as the Commission determines by rule to present fairly the results of the liquidation proceeding as



of the date of or for the period covered by such reports, having due regard for the requirements of section 78q of this title and the rules prescribed under such section and the magnitude of items and transactions involved in connection with the operations of a broker or dealer.

(d) Investigations. – The trustee shall –

(1) as soon as practicable, investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business, and any other matter, to the extent relevant to the liquidation proceeding, and report thereon to the court;

(2) examine, by deposition or otherwise, the directors and officers of the debtor and any other witnesses concerning any of the matters referred to in paragraph (1);

(3) report to the court any facts ascertained by the trustee with respect to fraud, misconduct, mismanagement, and irregularities, and to any causes of action available to the estate; and

(4) as soon as practicable, prepare and submit, to SIPC and such other persons as the court designates and in such form and manner as the court directs, a statement of his investigation of matters referred to in paragraph (1).

§ 78fff-2. Special provisions of a liquidation proceeding

(a) Notice and claims. –

(1) Notice of proceedings. – Promptly after the appointment of the trustee, such trustee shall cause notice of the commencement of proceedings under this section to be published in one or more newspapers of general circulation

in the form and manner determined by the court, and at the same time shall cause a copy of such notice to be mailed to each person who, from the books and records of the debtor, appears to have been a customer of the debtor with an open account within the past twelve months, to the address of such person as it appears from the books and records of the debtor. Notice to creditors other than customers shall be given in the manner prescribed by Title 11, except that such notice shall be given by the trustee.

(2) Statement of claim. – A customer shall file with the trustee a written statement of claim but need not file a formal proof of claim, except that no obligation of the debtor to any person associated with the debtor within the meaning of section 78c(a)(18) of this title or section 78c(a)(21) of this title, any beneficial owner of 5 per centum or more of the voting stock of the debtor or any member of the immediate family of any such person or owner may be satisfied without formal proof of claim.

(3) Time limitations. – No claim of a customer or other creditor of the debtor which is received by the trustee after the expiration of the six-month period beginning on the date of publication of notice under paragraph (1) shall be allowed, except that the court may, upon application within such period and for cause shown, grant a reasonable, fixed extension of time for the filing of a claim by the United States, by a State or political subdivision thereof, or by an infant or incompetent person without a guardian. Any claim of a customer for net equity which is received by the trustee after the expiration of such period of time as may be fixed by the court (not exceeding sixty days after the date of publication of notice under paragraph (1)) need not be paid or satisfied in



whole or in part out of customer property, and, to the extent such claim is satisfied from moneys advanced by SIPC, it shall be satisfied in cash or securities (or both) as the trustee determines is most economical to the estate.

(4) Effect on claims. – Except as otherwise provided in this section, and without limiting the powers and duties of the trustee to discharge obligations promptly as specified in this section, nothing in this section shall limit the right of any person, including any subrogee, to establish by formal proof or otherwise as the court may provide such claims as such person may have against the debtor, including claims for the payment of money and the delivery of specific securities, without resort to moneys advanced by SIPC to the trustee.

(b) Payments to customers. – After receipt of a written statement of claim pursuant to subsection (a)(2) of this section, the trustee shall promptly discharge, in accordance with the provisions of this section, all obligations of the debtor to a customer relating to, or net equity claims based upon, securities or cash, by the delivery of securities or the making of payments to or for the account of such customer (subject to the provisions of subsection (d) of this section and section 78fff-3(a) of this title) insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee. For purposes of distributing securities to customers, all securities shall be valued as of the close of business on the filing date. For purposes of this subsection, the court shall, among other things–

(1) with respect to net equity claims, authorize the trustee to satisfy claims out of

moneys made available to the trustee by SIPC notwithstanding the fact that there has not been any showing or determination that there are sufficient funds of the debtor available to satisfy such claims; and

(2) with respect to claims relating to, or net equities based upon, securities of a class and series of an issuer which are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee authorize the trustee to deliver securities of such class and series if and to the extent available to satisfy such claims in whole or in part, with partial deliveries to be made pro rata to the greatest extent considered practicable by the trustee.

Any payment or delivery of property pursuant to this subsection may be conditioned upon the trustee requiring claimants to execute, in a form to be determined by the trustee, appropriate receipts, supporting affidavits, releases, and assignments, but shall be without prejudice to any right of a claimant to file formal proof of claim within the period specified in subsection (a)(3) of this section for any balance of securities or cash to which such claimant considers himself entitled.

(c) Customer related property. –

(1) Allocation of customer property. – The trustee shall allocate customer property of the debtor as follows:

(A) first, to SIPC in repayment of advances made by SIPC pursuant to section 78fff-3(c)(1) of this title, to the extent such advances recovered securities which were apportioned to customer property pursuant to section 78fff(d) of this title;



(B) second, to customers of such debtor, who shall share ratably in such customer property on the basis and to the extent of their respective net equities;

(C) third, to SIPC as subrogee for the claims of customers;

(D) fourth, to SIPC in repayment of advances made by SIPC pursuant to section 78fff-3(c)(2) of this title.

Any customer property remaining after allocation in accordance with this paragraph shall become part of the general estate of the debtor. To the extent customer property and SIPC advances pursuant to section 78fff-3(a) of this title are not sufficient to pay or otherwise satisfy in full the net equity claims of customers, such customers shall be entitled, to the extent only of their respective unsatisfied net equities, to participate in the general estate as unsecured creditors. For purposes of allocating customer property under this paragraph, securities to be delivered in payment of net equity claims for securities of the same class and series of an issuer shall be valued as of the close of business on the filing date.

(2) Delivery of customer name securities. – The trustee shall deliver customer name securities to or on behalf of a customer of the debtor entitled thereto if the customer is not indebted to the debtor. If the customer is so indebted, such customer may, with the approval of the trustee, reclaim customer name securities upon payment to the trustee, within such period of time as the trustee determines, of all indebtedness of such customer to the debtor.

(3) Recovery of transfers. – Whenever customer property is not sufficient to pay in full the claims set forth in subparagraphs (A) through

(D) of paragraph (1), the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of Title 11. Such recovered property shall be treated as customer property. For purposes of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding.

(d) Purchase of securities. – The trustee shall, to the extent that securities can be purchased in a fair and orderly market, purchase securities as necessary for the delivery of securities to customers in satisfaction of their claims for net equities based on securities under section 78fff-1(b)(1) of this title and for the transfer of customer accounts under subsection (f) of this section, in order to restore the accounts of such customers as of the filing date. To the extent consistent with subsection (c) of this section, customer property and moneys advanced by SIPC may be used by the trustee to pay for securities so purchased. Moneys advanced by SIPC for each account of a separate customer may not be used to purchase securities to the extent that the aggregate value of such securities on the filing date exceeded the amount permitted to be advanced by SIPC under the provisions of section 78fff-3(a) of this title.

(e) Closeouts. –

(1) In general. – Any contract of the debtor for the purchase or sale of securities in the ordinary course of its business with other brokers or dealers which is wholly executory on the filing



date shall not be completed by the trustee, except to the extent permitted by SIPC rule. Upon the adoption by SIPC of rules with respect to the closeout of such a contract but prior to the adoption of rules with respect to the completion of such a contract, the other broker or dealer shall close out such contract, without unnecessary delay, in the best available market and pursuant to such SIPC rules. Until such time as SIPC adopts rules with respect to the completion or closeout of such a contract, such a contract shall be closed out in accordance with Commission Rule S6(d)-1 as in effect on May 21, 1978, or any comparable rule of the Commission subsequently adopted, to the extent not inconsistent with the provision of this subsection.

(2) Net profit or loss. – A broker or dealer shall net all profits and losses on all contracts closed out under this subsection and –

(A) if such broker or dealer shows a net profit on such contracts, he shall pay such net profit to the trustee; and

(B) if such broker or dealer sustains a net loss on such contracts, he shall be entitled to file a claim against the debtor with the trustee in the amount of such net loss.

To the extent that a net loss sustained by a broker or dealer arises from contracts pursuant to which such broker or dealer was acting for its own customer, such broker or dealer shall be entitled to receive funds advanced by SIPC to the trustee in the amount of such loss, except that such broker or dealer may not receive more than $40,000 for each separate customer with respect to whom it sustained a loss. With respect to a net loss which is not payable under the preceding sentence from funds advanced by SIPC, the broker or dealer shall

be entitled to participate in the general estate as an unsecured creditor.

(3) Registered clearing agencies. – Neither a registered clearing agency which by its rules has an established procedure for the closeout of open contracts between an insolvent broker or dealer and its participants, nor its participants to the extent such participants' claims are or may be processed within the registered clearing agency, shall be entitled to receive SIPC funds in payment of any losses on such contracts, except as SIPC may otherwise provide by rule. If such registered clearing agency or its participants sustain a net loss on the closeout of such contracts with the debtor, they shall have the right to participate in the general estate as unsecured creditors to the extent of such loss. Any funds or other property owed to the debtor, after the closeout of such contracts, shall be promptly paid to the trustee. Rules adopted by SIPC under this paragraph shall provide that in no case may a registered clearing agency or its participants, to the extent such participants' claims are or may be processed within the registered clearing agency, be entitled to receive funds advanced by SIPC in an amount greater, in the aggregate, than could be received by the participants if such participants proceeded individually under paragraphs (1) and (2).

(4) Definition. – For purposes of this subsection, the term "customer" does not include any person who –

(A) is a broker or dealer;

(B) had a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, was part of the capital of the claiming broker or dealer



or was subordinated to the claims of any or all creditors of such broker or dealer; or

(C) had a relationship of the kind specified in section 78fff-3(a)(5) of this title with the debtor.

A claiming broker or dealer shall be deemed to have been acting on behalf of its customer if it acted as agent for such customer or if it held such customer's order which was to be executed as a part of its contract with the debtor.

(f) Transfer of customer accounts. In order to facilitate the prompt satisfaction of customer claims and the orderly liquidation of the debtor, the trustee may, pursuant to the terms satisfactory to him and subject to the prior approval of SIPC, sell or otherwise transfer to another member of SIPC, without consent of any customer, all or any part of the account of a customer of the debtor. In connection with any such sale or transfer to another member of SIPC and subject to the prior approval of SIPC, the trustee may –

(1) waive or modify the need to file a written statement of claim pursuant to subsection (a)(2) of this section; and

(2) enter into such agreements as the trustee considers appropriate under the circumstances to indemnify any such member of SIPC against shortages of cash or securities in the customer accounts sold or transferred.

The funds of SIPC may be made available to guarantee or secure any indemnification under paragraph (2). The prior approval of SIPC to such indemnification shall be conditioned, among such other standards as SIPC may

determine, upon a determination by SIPC that the probable cost of any such indemnification can reasonably be expected not to exceed the cost to SIPC of proceeding under section 78fff-3(a) of this title and section 78fff-3(b) of this title.

§ 78fff-3. SIPC advances

(a) Advances for customers' claims. – In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys, not to exceed $500,000 for each customer, as may be required to pay or otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that –

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;



(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against

customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

(b) Other advances. – SIPC shall advance to the trustee –

(1) such moneys as may be required to carry out section 78fff-2(e) of this title; and

(2) to the extent the general estate of the debtor is not sufficient to pay any and all costs and expenses of administration of the estate of the debtor and of the liquidation proceeding, the amount of such costs and expenses.

(c) Discretionary advances. – SIPC may advance to the trustee such moneys as may be required to –

(1) pay or guarantee indebtedness of the debtor to a bank, lender, or other person under section 78fff-1(b)(2) of this title;

(2) guarantee or secure any indemnity under section 78fff-2(f) of this title; and

(3) purchase securities under section 78fff-2(d) of this title.

§ 78fff-4. Direct payment procedure

(a) Determination regarding direct payments. – If SIPC determines that –

(1) any member of SIPC (including a person who was a member within one hundred eighty days prior to such determination) has failed or is in danger of failing to meet its obligations to customers;

(2) one or more of the conditions specified in section 78eee(b)(1) of this title exist with respect to such member;



(3) the claim of each customer of the member is within the limits of protection provided in section 78fff-3(a) of this title;

(4) the claims of all customers of the member aggregate less than $250,000;

(5) the cost to SIPC of satisfying customer claims under this section will be less than the cost under a liquidation proceeding; and

(6) such member's registration as a broker-dealer under section 78*o*(b) of this title has been terminated, or such member has consented to the use of the direct payment procedure set forth in this section,

SIPC may, in its discretion, use the direct payment procedure set forth in this section in lieu of instituting a liquidation proceeding with respect to such member.

(b) Notice. – Promptly after a determination under subsection (a) of this section that the direct payment procedure is to be used with respect to a member, SIPC shall cause notice of such direct payment procedure to be published in one or more newspapers of general circulation in a form and manner determined by SIPC, and at the same time shall cause to be mailed a copy of such notice to each person who appears, from the books and records of such member, to have been a customer of the member with an open account within the past twelve months, to the address of such person as it appears from the books and records of such member. Such notice shall state that SIPC will satisfy customer claims directly, without a liquidation proceeding, and shall set forth the form and manner in which claims may be presented. A direct payment procedure shall be deemed to commence on the date of first publication under this subsection and no

claim by a customer shall be paid or otherwise satisfied by SIPC unless received within the six-month period beginning on such date, except that SIPC shall, upon application within such period, and for cause shown, grant a reasonable, fixed extension of time for the filing of a claim by the United States, by a State or political subdivision thereof, or by an infant or incompetent person without a guardian.

(c) Payments to customers. – SIPC shall promptly satisfy all obligations of the member to each of its customers relating to, or net equity claims based upon, securities or cash by the delivery of securities or the effecting of payments to such customer (subject to the provisions of section 78fff-2(d) of this title and section 78fff-3(a) of this title) insofar as such obligations are ascertainable from the books and records of the member or are otherwise established to the satisfaction of SIPC. For purposes of distributing securities to customers, all securities shall be valued as of the close of business on the date of publication under subsection (b) of this section. Any payment or delivery of securities pursuant to this section may be conditioned upon the execution and delivery, in a form to be determined by SIPC, of appropriate receipts, supporting affidavits, releases, and assignments. To the extent moneys of SIPC are used to satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers against the member.

(d) Effect on claims. – Except as otherwise provided in this section, nothing in this section shall limit the right of any person, including any subrogee, to establish by formal proof or otherwise such claims as such person



may have against the member, including claims for the payment of money and the delivery of specific securities, without resort to moneys of SIPC.

(e) Jurisdiction of Bankruptcy Courts. – After SIPC has published notice of the institution of a direct payment procedure under this section, any person aggrieved by any determination of SIPC with respect to his claim under subsection (c) of this section may, within six months following mailing by SIPC of its determination with respect to such claim, seek a final adjudication of such claim. The courts of the United States having jurisdiction over cases under Title 11 shall have original and exclusive jurisdiction of any civil action for the adjudication of such claim. Any such action shall be brought in the judicial district where the head office of the debtor is located. Any determination of the rights of a customer under subsection (c) of this section shall not prejudice any other right or remedy of the customer against the member.

(f) Discontinuance of direct payment procedures. – If, at any time after the institution of a direct payment procedure with respect to a member, SIPC determines, in its discretion, that continuation of such direct payment procedure is not appropriate, SIPC may cease such direct payment procedure and, upon so doing, may seek a protective decree pursuant to section 78eee of this title. To the extent payments of cash, distributions of securities, or determinations with respect to the validity of a customer's claim are made under this section, such payments, distributions, and determinations shall be recognized and given full effect in the event of any subsequent liquidation proceeding. Any action brought under

subsection (e) of this section and pending at the time of the appointment of a trustee under section 78eee(b)(3) of this title shall be permanently stayed by the court at the time of such appointment, and the court shall enter an order directing the transfer or removal to it of such suit. Upon such removal or transfer the complaint in such action shall constitute the plaintiff's claim in the liquidation proceeding, if appropriate, and shall be deemed received by the trustee on the date of his appointment regardless of the date of actual transfer or removal of such action.

(g) References. – For purposes of this section, any reference to the trustee in sections 78fff-1(b)(1), 78fff-2(d), 78fff-2(f), 78fff-3(a), 78*lll*(5) and 78*lll*(12) of this title shall be deemed a reference to SIPC, and any reference to the date of publication of notice under section 78fff-2(a) of this title shall be deemed a reference to the publication of notice under this section.

§ 78ggg. SEC functions

(a) Administrative procedure. – Determinations of the Commission, for purposes of making rules pursuant to section 78ccc(e)(3) of this title and section 78iii(f) of this title shall be after appropriate notice and opportunity for a hearing, and for submission of views of interested persons, in accordance with the rulemaking procedures specified in section 553 of Title 5, but the holding of a hearing shall not prevent adoption of any such rule or regulation upon expiration of the notice period specified in subsection (d) of such section and shall not be required



to be on a record within the meaning of subchapter II of chapter 5 of such title.

(b) Enforcement of actions. – In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

(c) Examinations and reports. –

(1) Examination of SIPC, etc. – The Commission may make such examinations and inspections of SIPC and require SIPC to furnish it with such reports and records or copies thereof as the Commission may consider necessary or appropriate in the public interest or to effectuate the purposes of this chapter.

(2) Reports from SIPC. – As soon as practicable after the close of each fiscal year, SIPC shall submit to the Commission a written report relative to the conduct of its business, and the exercise of the other rights and powers granted by this chapter, during such fiscal year. Such report shall include financial statements setting forth the financial position of SIPC at the end of such fiscal year and the results of its operations (including the source and application of its funds) for such fiscal year. The financial statements so included shall be examined by an independent public accountant or firm of independent public accountants, selected by SIPC and satisfactory to the Commission, and shall be accompanied by the report thereon of such accountant or firm. The Commission shall

transmit such report to the President and the Congress with such comment thereon as the Commission may deem appropriate.

§ 78hhh. Examining authority functions

Each member of SIPC shall file with such member's examining authority, or collection agent if a collection agent has been designated pursuant to section 78iii(a) of this title, such information (including reports of, and information with respect to, the gross revenues from the securities business of such member, including the composition thereof, transactions in securities effected by such member, and other information with respect to such member's activities, whether in the securities business or otherwise, including customer accounts maintained, net capital employed, and activities conducted) as SIPC may determine to be necessary or appropriate for the purpose of making assessments under section 78ddd of this title. The examining authority or collection agent shall file with SIPC all or such part of such information (and such compilations and analyses thereof) as SIPC, by bylaw or rule, shall prescribe. No application, report, or document filed pursuant to this section shall be deemed to be filed pursuant to section 78r of this title.

§ 78iii. Functions of self-regulatory organizations

(a) Collection agent. – Each self-regulatory organization shall act as collection agent for SIPC to collect the assessments payable by all members of SIPC for whom such self-regulatory organization is the examining



authority, unless SIPC designates a self-regulatory organization other than the examining authority to act as collection agent for any member of SIPC who is a member of or participant in more than one self regulatory organization. If the only self-regulatory organization of which a member of SIPC is a member or in which it is a participant is a registered clearing agency that is not the examining authority for the member, SIPC may, nevertheless, designate such registered clearing agency as collection agent for the member or may require that payments be made directly to SIPC. The collection agent shall be obligated to remit to SIPC assessments made under section 78ddd of this title only to the extent that payments of such assessment are received by such collection agent. Members of SIPC who are not members of or participants in a self-regulatory organization shall make payments directly to SIPC.

(b) Immunity. – No self-regulatory organization shall have any liability to any person for any action taken or omitted in good faith pursuant to Section 78eee(a)(1) and Section 78eee(a)(2) of this title.

(c) Inspections. – The self-regulatory organization of which a member of SIPC is a member or in which it is a participant shall inspect or examine such member for compliance with applicable financial responsibility rules, except that –

(1) if the self-regulatory organization is a registered clearing agency, the Commission may designate itself as responsible for the examination of such member for compliance with applicable financial responsibility rules; and

(2) if a member of SIPC is a member of or participant in more than one self-regulatory organization, the Commission, pursuant to section 78q(d) of this title, shall designate one of such self-regulatory organizations or itself as responsible for the examination of such member for compliance with applicable financial responsibility rules.

(d) Reports. – There shall be filed with SIPC by the self-regulatory organizations such reports of inspections or examinations of the members of SIPC (or copies thereof) as may be designated by SIPC by bylaw or rule.

(e) Consultation. – SIPC shall consult and cooperate with the self-regulatory organizations toward the end:

(1) that there may be developed and carried into effect procedures reasonably designed to detect approaching financial difficulty upon the part of any member of SIPC;

(2) that, as nearly as may be practicable, examinations to ascertain whether members of SIPC are in compliance with applicable financial responsibility rules will be conducted by the self-regulatory organizations under appropriate standards (both as to method and scope) and reports of such examinations will, where appropriate, be standard in form; and

(3) that, as frequently as may be practicable under the circumstances, each member of SIPC will file financial information with, and be examined by, the self-regulatory organization which is the examining authority for such member.

(f) Financial condition of members. – The Commission may, by such rules as it determines necessary or appropriate in the public interest and to carry out the



purposes of this chapter, require any self-regulatory organization to furnish SIPC with reports and records (or copies thereof) relating to the financial condition of members of or participants in such self-regulatory organization.

§ 78jjj. Prohibited acts

(a) Failure to pay assessment, etc. – If a member of SIPC shall fail to file any report or information required pursuant to this chapter, or shall fail to pay when due all or any part of an assessment made upon such member pursuant to this chapter, and such failure shall not have been cured, by the filing of such report or information or by the making of such payment, together with interest and penalty thereon, within five days after receipt by such member of written notice of such failure given by or on behalf of SIPC, it shall be unlawful for such member, unless specifically authorized by the Commission, to engage in business as a broker or dealer. If such member denies that it owes all or any part of the amount specified in such notice, it may after payment of the full amount so specified commence an action against SIPC in the appropriate United States district court to recover the amount it denies owing.

(b) Engaging in business after appointment of trustee or initiation of direct payment procedure. – It shall be unlawful for any broker or dealer for whom a trustee has been appointed pursuant to this chapter or for whom a direct payment procedure has been initiated to engage thereafter in business as a broker or dealer, unless

the Commission otherwise determines in the public interest. The Commission may by order bar or suspend for any period, any officer, director, general partner, owner of 10 per centum or more of the voting securities, or controlling person of any broker or dealer for whom a trustee has been appointed pursuant to this chapter or for whom a direct payment procedure has been initiated from being or becoming associated with a broker or dealer, if after appropriate notice and opportunity for hearing, the Commission shall determine such bar or suspension to be in the public interest.

(c) Concealment of assets; false statements or claims. –

(1) Specific prohibited acts. – Any person who, directly or indirectly, in connection with or in contemplation of any liquidation proceeding or direct payment procedure –

(A) employs any device, scheme, or artifice to defraud;

(B) engages in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person; or

(C) fraudulently or with intent to defeat this chapter –

(i) conceals or transfers any property belonging to the estate of a debtor;

(ii) makes a false statement or account;

(iii) presents or uses any false claim for proof against the estate of a debtor;



(iv) receives any material amount of property from a debtor;

(v) gives, offers, receives, transfers, or obtains any money or property, remuneration, compensation, reward, advantage, other consideration, or promise thereof, for acting or forbearing to act;

(vi) conceals, destroys, mutilates, falsifies, makes a false entry in, or otherwise falsifies any document affecting or relating to the property or affairs of a debtor; or

(vii) withholds, from any person entitled to its possession, any document affecting or relating to the property or affairs of a debtor,

shall be fined not more than $50,000 or imprisoned for not more than five years, or both.

(2) Fraudulent conversion. – Any person who, directly or indirectly steals, embezzles, or fraudulently, or with intent to defeat this chapter, abstracts or converts to his own use or to the use of another any of the moneys, securities, or other assets of SIPC, or otherwise defrauds or attempts to defraud SIPC or a trustee by any means, shall be fined not more than $50,000 or imprisoned not more than five years, or both.

§ 78kkk. Miscellaneous provisions

(a) Public inspection of reports. – Any notice, report, or other document filed with SIPC pursuant to this chapter shall be available for public inspection unless SIPC or the Commission shall determine that disclosure thereof is not in the public interest. Nothing herein shall act to deny documents or information to the Congress of

the United States or the committees of either House having jurisdiction over financial institutions, securities regulation, or related matters under the rules of each body. Nor shall the Commission be denied any document or information which the Commission, in its judgment, needs.

(b) Liability of members of SIPC. – Except for such assessments as may be made upon such member pursuant to the provisions of section 78ddd of this title, no member of SIPC shall have any liability under this chapter as member of SIPC for, or in connection with, any act or omission of any other broker or dealer whether in connection with the conduct of the business or affairs of such broker or dealer or otherwise and, without limiting the generality of the foregoing, no member shall have any liability for or in respect of any indebtedness or other liability of SIPC.

(c) Liability of SIPC and Directors, officers, or employees. – Neither SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter.

(d) Advertising. – SIPC shall by bylaw prescribe the manner in which a member of SIPC may display any sign or signs (or include in any advertisement a statement) relating to the protection to customers and their accounts, or any other protections, afforded under this chapter. No member may display any such sign, or include in an advertisement any such statement, except in accordance with such bylaws. SIPC may also by bylaw prescribe such minimal requirements as it considers necessary and



appropriate to require a member of SIPC to provide public notice of its membership in SIPC.

(e) SIPC exempt from taxation. – SIPC, its property, its franchise, capital, reserves, surplus, and its income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State or local taxing authority, except that any real property and any tangible personal property (other than cash and securities) of SIPC shall be subject to State and local taxation to the same extent according to its value as other real and tangible personal property is taxed. Assessments made upon a member of SIPC shall constitute ordinary and necessary expenses in carrying on the business of such member for the purpose of section 162(a) of Title 26. The contribution and transfer to SIPC of funds or securities held by any trust established by a national securities exchange prior to January 1, 1970, for the purpose of providing assistance to customers of members of such exchange, shall not result in any taxable gain to such trust or give rise to any taxable income to any member of SIPC under any provision of Title 26, nor shall such contribution or transfer, or any reduction in assessments made pursuant to this chapter, in any way affect the status, as ordinary and necessary expenses under section 162(a) of Title 26, of any contributions made to such trust by such exchange at any time prior to such transfer. Upon dissolution of SIPC, none of its net assets shall inure to the benefit of any of its members.

(f) Section 78t(a) of this title not to apply. – The provisions of subsection (a) of section 78t of this title shall not apply to any liability under or in connection with this chapter.

(g) SEC study of unsafe or unsound practices. – Not later than twelve months after December 30, 1970, the Commission shall compile a list of unsafe or unsound practices by members of SIPC in conducting their business and report to the Congress (1) the steps being taken under the authority of existing law to eliminate those practices and (2) recommendations concerning additional legislation which may be needed to eliminate those unsafe or unsound practices.

§ 78*lll*. Definitions

For purposes of this chapter including the application of the Bankruptcy Act to a liquidation proceeding:

(1) Commission. – The term "Commission" means the Securities and Exchange Commission.

(2) Customer. – The term "customer" of a debtor means any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral security, or for purposes of effecting transfer. The term "customer" includes any person who has a claim against the debtor arising out of sales or conversions of such securities, and any person who has deposited cash with the debtor for the purpose of purchasing securities, but does not include –



(A) any person to the extent that the claim of such person arises out of transactions with a foreign subsidiary of a member of SIPC; or

(B) any person to the extent that such person has a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor, or is subordinated to the claims of any or all creditors of the debtor, notwithstanding that some ground exists for declaring such contract, agreement, or understanding void or voidable in a suit between the claimant and the debtor.

(3) Customer name securities. – The term "customer name securities" means securities which were held for the account of a customer on the filing date by or on behalf of the debtor and which on the filing date were registered in the name of the customer, or were in the process of being so registered pursuant to instructions from the debtor, but does not include securities registered in the name of the customer which, by endorsement or otherwise, were in negotiable form.

(4) Customer property. – The term "customer property" means cash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted. The term "customer property" includes –

(A) securities held as property of the debtor to the extent that the inability of the debtor to meet its obligations to customers

for their net equity claims based on securities of the same class and series of an issuer is attributable to the debtor's noncompliance with the requirements of section 78*o*(c)(3) of this title and the rules prescribed under such section;

(B) resources provided through the use or realization of customers' debit cash balances and other customer-related debit items as defined by the Commission by rule;

(C) any cash or securities apportioned to customer property pursuant to section 78fff(d) of this title; and

(D) any other property of the debtor which, upon compliance with applicable laws, rules, and regulations, would have been set aside or held for the benefit of customers, unless the trustee determines that including such property within the meaning of such term would not significantly increase customer property.

(5) Debtor. – The term "debtor" means a member of SIPC with respect to whom an application for a protective decree has been filed under section 78eee(a)(3) of this title or a direct payment procedure has been instituted under section 78fff-4(b) of this title.

(6) Examining authority. – The term "examining authority" means, with respect to any member of SIPC (A) the self-regulatory organization which inspects or examines such member of SIPC, or (B) the Commission if such member of SIPC is not a member of or participant in any self-regulatory organization or if the Commission has designated itself examining authority for such member pursuant to section 78iii(c) of this title.



(7) Filing date. – The term "filing date" means the date on which an application for a protective decree is filed under section 78eee(a)(3) of this title, except that –

(A) if a petition under Title 11 concerning the debtor was filed before such date, the term "filing date" means the date on which such petition was filed;

(B) if the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term "filing date" means the date on which such proceeding was commenced; or

(C) if the debtor is the subject of a direct payment procedure or was the subject of a direct payment procedure discontinued by SIPC pursuant to section 78fff-4(f) of this title, the term "filing date" means the date on which notice of such direct payment procedure was published under section 78fff-4(b) of this title.

(8) Foreign subsidiary. – The term "foreign subsidiary" means any subsidiary of a member of SIPC which has its principal place of business in a foreign country or which is organized under the laws of a foreign country.

(9) Gross revenues from the securities business. – The term "gross revenues from the securities business" means the sum of (but without duplication) –

(A) commissions earned in connection with transactions in securities effected for customers as agent (net of commissions

paid to other brokers and dealers in connection with such transactions) and markups with respect to purchases or sales of securities as principal;

(B) charges for executing or clearing transactions in securities for other brokers and dealers;

(C) the net realized gain, if any, from principal transactions in securities in trading accounts;

(D) the net profit, if any, from the management of or participation in the underwriting or distribution of securities;

(E) interest earned on customers' securities accounts;

(F) fees for investment advisory services (except when rendered to one or more registered investment companies or insurance company separate accounts) or account supervision with respect to securities;

(G) fees for the solicitation of proxies with respect to, or tenders or exchanges of, securities;

(H) income from service charges or other surcharges with respect to securities;

(I) except as otherwise provided by rule of the Commission, dividends and interest received on securities in investment accounts of the broker or dealer;

(J) fees in connection with put, call, and other option transactions in securities;

(K) commissions earned from transactions in (i) certificates of deposit, and (ii) Treasury bills, bankers acceptances, or commercial paper which have a maturity at the



time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof, the maturity of which is likewise limited, except that SIPC shall by bylaw include in the aggregate of gross revenues only an appropriate percentage of such commissions based on SIPC's loss experience with respect to such instruments over at least the preceding five years; and

(L) fees and other income from such other categories of the securities business as SIPC shall provide by bylaw.

Such term does not include revenues received by a broker or dealer in connection with the distribution of shares of a registered open end investment company or unit investment trust or revenues derived by a broker or dealer from the sale of variable annuities or from the conduct of the business of insurance.

(10) Liquidation proceeding. – The term "liquidation proceeding" means any proceeding for the liquidation of a debtor under this chapter in which a trustee has been appointed under section 78eee(b)(3) of this title.

(11) Net equity. – The term "net equity" means the dollar amount of the account or accounts of a customer, to be determined by –

(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus

(B) any indebtedness of such customer to the debtor on the filing date; plus

(C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section 78fff-2(a) of this title).

In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

(12) Persons registered as brokers or dealers. – The term "persons registered as brokers or dealers" includes any person who is a member of a national securities exchange other than a government securities broker or government securities dealer registered under section 78*o*-5(a)(1)(A) of this title.

(13) Protective decree. – The term "protective decree" means a decree, issued by a court upon application of SIPC under section 78eee(a)(3) of this title, that the customers of a member of SIPC are in need of the protection provided under this chapter.

(14) Security. – The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, any collateral trust certificate, preorganization certificate or subscription, transferable share, voting trust certificate, certificate of deposit, certificate of deposit for a security, any investment contract or certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or mineral royalty or lease (if such investment contract or interest is the subject of a registration statement with the Commission pursuant to the provisions of the Securities Act of 1933 [15 U.S.C.A. § 77a et



seq.]), any put, call, straddle, option, or privilege on any security, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase or sell any of the foregoing, and any other instrument commonly known as a security. Except as specifically provided above, the term "security" does not include any currency, or any commodity or related contract or futures contract, or any warrant or right to subscribe to or purchase or sell any of the foregoing.

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## SECURITIES EXCHANGE ACT OF 1934, SECTION 10(b)
## (15 U.S.C. § 78j(b))

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility or any national securities exchange –

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

## SECURITIES AND EXCHANGE COMMISSION RULE 10b-5
## (17 C.F.R. § 240.10b-5)

§ 240.10b-5. Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or



(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

## SECURITIES EXCHANGE ACT OF 1934, Section 32 (15 U.S.C. § 78ff)

(a) Willful violations; false and misleading statements

Any person who wilfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000 or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue.



Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates section 78dd-1(a) of this title shall be fined no more than $2,000,000.

(B) Any issuer that violates section 78dd-1(a) of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer or director of an issuer, or stockholder acting on behalf of such issuer, who willfully violates section 76dd-1(a) of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any employee or agent of an issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such issuer), and who willfully violates section 78dd-1(a) of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(C) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates section 78dd-1(a) of this title shall be subject to a

civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent or stockholder of an issuer, such fine may not be paid, directly or indirectly by such issuer.